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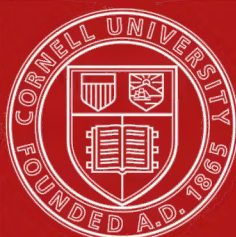
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A TREATISE ON THE LAW
OF
CONVERSION

A TREATISE
ON
THE LAW OF CONVERSION

BY
RENZO D. BOWERS
AUTHOR OF "THE LAW OF WAIVER"

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TO
MY SON,

THESE PAGES ARE INSCRIBED; FOR WHOM MY
AMBITION DURST SCARCELY TO BE BREATHED
LEST IN LATER YEARS YOUR TREND OF MIND
AND DESIRE OF PURPOSE LEAD YOU INTO OTHER
FIELDS OF ACTION, AND THUS MY THOUGHT BE
DOOMED TO DISAPPOINTMENT. BUT WHETHER OR
NOT YOUR STEPS LEAD INTO LAW, MY OWN DESIRE
FOR YOU SHALL BE OBEDIENCE TO ITS SLIGHTEST
ADMONITION, FOR IN SUCH OBEDIENCE YOU WILL
FIND THE BEST AND HIGHEST MARK OF CITIZENSHIP.

R. D. B.

PREFACE

It has been a favorite diversion of the profession for a vast number of years to decry the rapid multiplication of law books, and this pastime has been in a measure indulged in by the bench and legal periodicals as well. But the avidity with which the practitioner has seized upon legal treatises that might be the means of assisting him in the solution of a weighty problem upon which he could elsewhere find no light has always been, and always will be, a complete justification for the writer of a volume upon any subject of the law.

It is somewhat remarkable that there has been thus far an absence from the list of legal publications of anything, further than short cyclopædic discussion, that sets forth the principles applicable to so important a subject as the LAW OF CONVERSION.

Indeed, however, it has been the vague opinion in some quarters that this subject, which by a study of legal history will be found of rather ancient origin, has been merged in our reformed procedure so as to have completely lost its identity. But it would seem that this mistaken notion has been aided, if not originated, by reason of the fact that wherever the subject has been treated it has been denominated TROVER AND CONVERSION, and thereby an undue prominence has been given to the TROVER part of the subject, and the CONVERSION part has consequently been in a measure undervalued.

Conversion is a distinct violation of rights in personal property which, by the courts and legal writers, has been clearly, simply and definitely defined. Trover was the form of action under the common law, proceeding upon well-determined rules, for the redress of such wrongs; which form, however, in those states which have adopted the modern system of procedure, is now merged in the simple civil action. The principles of conversion still remain as distinct and definite as they ever were, and the more than six thousand cases

PREFACE

cited in this volume are an indication of the vast number of times that the courts have been called on to expound these principles.

I have sought to make such arrangement in the discussion of my theme as will preserve its simplicity and clearness and enable the practitioner to readily come upon the principles governing the point which he has in consideration. I have further endeavored to give all cross-references to the citations herein so that the cases referred to may be found in any library whether great or small.

With the hope that this work may be found of some assistance to the members of the profession, I now submit it for their consideration.

R. D. B.

ROSWELL, NEW MEXICO,
January 8, 1917.

TABLE OF CONTENTS

	PAGE
TABLE OF CASES CITED	xxvii

CHAPTER I

§§ 1-10. WHAT IS CONVERSION, Pages 1-6

	PAGE		PAGE
§ 1. Definition	1	§ 6. Same Subject; When Intent Immaterial	4
§ 2. Ingredients of a Conversion	2	§ 7. What Interference Necessary in a Conversion	5
§ 3. Whether Use of Chattels a Conversion	3	§ 8. Intent May Affect Measure of Damages	5
§ 4. How Far Wrongful Intent Essential	3	§ 9. A Conversion Deprives Owner of his Property	5
§ 5. Same Subject; Good Intentions Sometimes Excuse Defendant	4	§ 10. Interference Must be Wrongful	6

CHAPTER II

§§ 11-15. WHAT IS TROVER, Pages 7-9

§ 11. Is Form of Action to Recover Damages for Conversion	7	§ 13. Similar to Detinue	8
§ 12. How Different from Trespass	8	§ 14. How Different from Replevin	8
		§ 15. Action is Transitory	8

CHAPTER III

§§ 16-51. WHAT MAY BE CONVERTED, Pages 10-39

1. MONEY		3. SHARES OF STOCK	
§ 16. When Trover may be Maintained for Money	11	§ 21. Difference between Conversion of Shares and Certificate	15
§ 17. Same Subject	11	§ 22. How Conversion of Stock may Occur	16
§ 18. When Specific Money cannot be Identified	12		
2. BILLS AND NOTES		4. MUNIMENTS OF TITLE	
§ 19. How may be Converted	13	§ 23. What Are, and Whether may be Converted	17
§ 20. Where Consideration of Note Illegal	14		
		5. JUDGMENTS AND RECORDS	
		§ 24. Not Subject to Conversion	17

TABLE OF CONTENTS

	PAGE		PAGE
6. BUILDINGS		13. STOLEN PROPERTY	
§ 25. If Personal Property, may be Converted	18	§ 39. Trover may Ordinarily be Maintained for	29
7. FIXTURES		§ 40. Owner may Sue Thief or Person in Possession	30
§ 26. May be Converted if not Part of Realty	19	§ 41. Trover not Maintain- able for Stolen Money or Negotiable Instruments	31
§ 27. Agreement of Parties Determines Char- acter	20	§ 42. Whether Necessary to First Prosecute Thief	32
8. CROPS			
§ 28. May be Converted if Personalty	20	14. COLLATERAL SECURITY AND PLEGDED PROPERTY	
§ 29. Wrongful Removal a Conversion	21	§ 43. Duty of Pledgee to Protect	32
§ 30. Whether Purchase of, a Conversion	22	§ 44. Acts by Pledgee Amounting to Con- version	33
9. TIMBER		§ 45. Sale by Pledgee With- out Notice	34
§ 31. Cannot be Converted till Severed	22	§ 46. Sale by Pledgee must be Public	35
§ 32. Question as to Measure of Damages	23	§ 47. Pledgee Cannot Buy at his Own Sale	36
10. ROCK, GRAVEL AND ORE		§ 48. What Does Not Amount to Conversion by Pledgee	36
§ 33. Are not Subject to Con- version till Severed from Soil	24	§ 49. Acts or Conduct of Pledgor may Amount to Waiver of the Con- version	38
§ 34. Same Subject	25	§ 50. When Pledgor Must Tender Payment and Demand the Prop- erty Prior to Trover	38
11. ANIMALS		§ 51. What Acts by Third Parties Amount to Conversion	39
§ 35. Domestic and Reclaimed Wild Animals may be Converted	26		
§ 36. Conversion of Hired Animals	27		
§ 37. Liability of Minors for Conversion of Horses	28		
12. MISCELLANEOUS CHATTELS			
§ 38. When Subjects of Con- version	29		

CHAPTER IV

§§ 52-256. WHO MAY BE GUILTY OF CONVERSION, Pages 40-188

1. PRINCIPALS		§ 53. Principal is Liable for Conversion by Agent	44
§ 52. Relation of Principal and Agent	43		

TABLE OF CONTENTS

	PAGE		PAGE
2. AGENTS		§ 75. Same Subject; Who may Buy Pledged Property	59
§ 54. Agents in General . . .	45	§ 76. Whether Tender by Pledgor Necessary . . .	60
§ 55. Agent, though Inno- cent, is Liable	45	§ 77. Remedies of Pledgor for Conversion of Prop- erty Pledged	61
§ 56. Same Subject; Illustra- tions	46	§ 78. Statutory Rights of Pledgors and Pledgeses . . .	62
§ 57. Brokers and Factors, Liability of	47		
§ 58. Exceptions in Some Cases	47	5. BAILEES	
§ 59. Auctioneers; Liable for Wrongful Sale	48	§ 79. Duties and Liabilities of Bailees, in General . . .	62
§ 60. Same Subject; Knowl- edge of Wrong	49	§ 80. Conversion by Mis-use of Property Bailed . . .	63
§ 61. Conversion of Princi- pal's Property	50	§ 81. What Deviation from Line of Travel Amounts to Conver- sion by Hirer of Horse	65
§ 62. Agent Liable for Dis- obeying Instructions . . .	50	§ 82. Mis-use of Hired Chattel . . .	66
§ 63. Difference between Con- version by Agent and Breach of Trust	51	§ 83. Liability of Infant Bailee	67
3. OFFICERS		§ 84. Wrongful Sale of Bailed Property by Bailee . . .	67
§ 64. Conversion by Officers . . .	51	§ 85. Same Subject; Bailor's Right of Possession . . .	68
§ 65. Officer Levying on Property of Wrong Person	52	§ 86. Delivery by Bailee to Unauthorized Person . . .	69
§ 66. Same Subject; Wrong- ful Attachment	53	§ 87. Wrongful Delivery by Gratuitous Bailee . . .	69
§ 67. Liability of Persons Di- recting Levy	54	§ 88. Delivery by Bailee to One Whom he Found in Possession	70
§ 68. Judgment Plaintiff As- sisting in Wrongful Seizure	54	§ 89. Where Goods Taken from Bailee by Officer . . .	70
4. PLEDGEES		§ 90. Where Contract of Bail- ment is Void; Hiring Horses on Sunday . . .	71
§ 69. Who are Pledgeses	55	§ 91. Failure or Refusal of Bailee to Deliver or Return Property	73
§ 70. Pledgee has Sufficient Interest to Sue for Conversion	56	§ 92. Same Subject; Reason- able Refusal no Con- version	74
§ 71. What Acts of Pledgee Amount to Conver- sion	57	§ 93. Same Subject; What Refusal Amounts to Conversion	75
§ 72. Duties of Pledgee as to Property Pledged	57		
§ 73. Unauthorized Sale or Re-pledge by Pledgee . . .	58		
§ 74. Same Subject; How Sale to be Made	59		

TABLE OF CONTENTS

	PAGE		PAGE
6. EXECUTORS AND ADMINISTRATORS		§ 111. Same Subject	91
§ 94. When Liable as Such, and When Individually	76	§ 112. Same Subject; Carrier's Right to Rely upon Appearances of Ownership	91
7. CARRIERS OF GOODS		§ 113. Custom Regulating Delivery by Carriers	92
§ 95. Duties of Carriers, in General	77	§ 114. Payment of Freight as Condition Precedent to Action	92
§ 96. Same Subject	77	§ 115. Demand by Carrier of Payment of Charges Other than Freight	93
§ 97. Deviation by Carrier from Regular or Authorized Route	78	§ 116. Where Carrier Receives Stolen Goods for Carriage	93
§ 98. Failure or Refusal of Carrier to Deliver Goods	79	§ 117. Demand for Unreasonable Freight Charges	94
§ 99. Same Subject; Amounts to a Conversion	79	§ 118. Surrender of Goods under Legal Process	94
§ 100. Same Subject; Delivery to Consignee Before Notice of Claim of Another	81	§ 119. Same Subject; Process Must be Fair on Its Face	95
§ 101. Duty of Carrier as to Conflicting Claimants of Goods	81	§ 120. Same Subject; Where Process Invalid	96
§ 102. Same Subject; Applying Rule of <i>Caveat Emptor</i>	83	§ 121. Same Subject; Carrier must Give Notice to Owner	97
§ 103. Same Subject; Qualified Refusal is No Conversion	84	§ 122. Miscellaneous Instances of Conversion by Carrier	97
§ 104. Burden of Proof	84		
§ 105. Wrongful Delivery by Carrier	84	8. MORTGAGOR OR MORTGAGEE	
§ 106. Same Subject; Delivery to be According to Bill of Lading	85	§ 123. By Mortgagor or His Successor in Interest	98
§ 107. Carrier Must Demand Production of Bill of Lading	86	§ 124. Use by Mortgagor no Conversion, When	99
§ 108. What Amounts to Wrongful Delivery by Carrier	87	§ 125. Trover against Those Claiming under Mortgagor	99
§ 109. Fault of Consignor or Consignee Excuses Mis-delivery by Carrier	88	§ 126. Same Subject; Where Interest of Mortgagor Levied Upon	100
§ 110. Mis-delivery by Carrier Induced by Fraud	89	§ 127. Same Subject	101
		§ 128. Conversion of Mortgaged Chattels by Third Persons	102
		§ 129. By Mortgagee or His Successor in Interest	103

TABLE OF CONTENTS

	PAGE		PAGE
§ 130. Conversion by Irregular Foreclosure of Mortgage	105	§ 152. Agreement of Parties may Preclude Trover	126
9. CORPORATIONS		§ 153. Conversion of Trust Property	126
§ 131. General Rules Relating to Corporations	106	§ 154. Sale of Stock Held in Trust	128
§ 132. Transfer to Wrongful Holder of Shares	107	§ 155. Conversion of Special Deposits by Banks	128
§ 133. Corporation must Demand Surrender of Certificate	108	10. MUNICIPAL CORPORATIONS	
§ 134. Corporation is Trustee for Stockholders	108	§ 156. Liability for Torts in General	129
§ 135. Mistake in Transferring Stock	110	§ 157. Distinction between Municipal and Quasi-Municipal Corporations	129
§ 136. Corporation Refusing to Enter Name of Holder of Shares	110	§ 158. To Create Liability Act Must be within Scope of Power	130
§ 137. Third Person Causing Wrongful Refusal to Transfer Stock	111	§ 159. <i>Ultra Vires</i> Acts	131
§ 138. Where Corporation has Lien Against Stock	112	§ 160. What Duties Imposed on Municipal Corporation	131
§ 139. When May Refuse to Transfer Stock	113	§ 161. Same Subject	131
§ 140. Same Subject	116	§ 162. Attempted Enforcement of Illegal Ordinance	132
§ 141. Where Certificate Fails to Disclose Lien of Corporation	117	§ 163. Whether Liability of Municipal Corporation Implied	132
§ 142. Where Certificate Represents Stock Fully Paid	118	§ 164. Unlawful Acts, but Within Scope of Municipal Power	133
§ 143. Refusal of Corporation to Issue Stock	118	§ 165. Same Subject; Acts of Agent in Good Faith	133
§ 144. Conversion of Shares or Certificates	118	§ 166. Same Subject	134
§ 145. Same Subject	119	§ 167. Same Subject	134
§ 146. Same Subject	120	§ 168. Same Subject; Illustrations	135
§ 147. Either Certificate or Share May be Converted	120	§ 169. Rule of <i>Respondent Superior</i>	136
§ 148. Same Subject	121	§ 170. Same Subject	137
§ 149. Illustrations of the Rule	122	§ 171. Same Subject; When City Liable for Acts of Officers	137
§ 150. Irregular Sale of Stock for Unpaid Assessments	124	§ 172. Same Subject	138
§ 151. Remedy of Stockholder for Wrongful Sale	124	§ 173. Where City Manages Property for Profit	138
		§ 174. Liability of City for Personal Injuries	139

TABLE OF CONTENTS

	PAGE		PAGE
§ 175. Negligent Performance of Ministerial Duties	139	§ 200. Conversion of Bailed Property	152
§ 176. Ratification of Wrongful Act of Officers	139	§ 201. Misapplication of Property Intrusted to Partner	153
§ 177. Conversion in General	140	§ 202. Tort of Partner Outside Scope of Firm Business	153
§ 178. Whether Municipal Corporation Liable in Trover	140	§ 203. Where Special Authority Given One Partner	154
§ 179. Illustrations of Conversion	141	§ 204. Same Subject; Where Firm Receives Benefit	154
§ 180. Abatement of Nuisances	141	§ 205. Same Subject; Knowledge of Non-participating Partner Must be Shown	155
§ 181. Same Subject	142		
§ 182. Same Subject; What are Nuisances	143	12. CO-TENANTS	
§ 183. Same Subject	144	§ 206. Liability of; In General	155
§ 184. Same Subject	144	§ 207. One Claiming to be Sole Owner of Joint Property	156
§ 185. Removal of Structures to Prevent Fire	145	§ 208. Sale of the Joint Property	157
§ 186. Same Subject; Whether Exercise of Eminent Domain	145	§ 209. Same Subject	157
§ 187. Same Subject	146	§ 210. Same Subject; Whether Sale Amounts to Destruction	157
§ 188. Same Subject	146	§ 211. Same Subject	158
§ 189. Same Subject; Where Statute Allows Compensation	147	§ 212. Same Subject	158
§ 190. Same Subject; Law of Necessity	147	§ 213. Same Subject; Sale of Crops	159
§ 191. Same Subject; Where Building would have Burned at All Events	148	§ 214. Wrongful Purchase by Defendant	159
11. PARTNERS		§ 215. Rule Denying Trover for a Sale	160
§ 192. Each Partner is Agent of Firm	148	§ 216. Same Subject	161
§ 193. Each Partner Liable for Torts of Firm	148	§ 217. Same Subject	162
§ 194. Firm Liable for Conversion by Partner	149	§ 218. Same Subject	163
§ 195. Liability of Partners is Joint and Several	149	§ 219. Conversion by Destruction	163
§ 196. Act of Partner in Scope of Firm Business	150	§ 220. Merely Retaining Possession, no Conversion	164
§ 197. Illustrations of Conversion for which Firm Liable	151	§ 221. Property held on Shares	164
§ 198. Same Subject	151	§ 222. Removal of the Common Property	165
§ 199. Same Subject	152	§ 223. Same Subject	166
		§ 224. Same Subject; Chat-	

TABLE OF CONTENTS

	PAGE		PAGE
tels Attached to Realty	166	<i>Caveat Emptor</i> Applied	177
§ 225. Removal and Conversion of Crops	167	§ 241. Purchaser from Co-tenant	178
§ 226. Permitting Loss of Property	168	§ 242. Purchaser from Agent	178
§ 227. Change from Personal to Real Property	168	§ 243. Where Sale in Usual Course of Trade	179
§ 228. Refusing to Segregate	169	§ 244. Where Agent Violates Instructions	180
§ 229. Mis-use of the Property	170	§ 245. Agent Merely Intrusted with Possession	180
§ 230. Changing Form of Property	170	§ 246. Purchasers from Vendees in Conditional Sales	181
§ 231. Wrongful Intermingling of Chattels	170	§ 247. Same Subject; No Title Passes	182
§ 232. Excluding Co-owner from Possession	171	§ 248. Purchasers from Fraudulent Vendees	183
§ 233. Same Subject; Whether Property Severable	171	§ 249. Where Owner Clothcd Vendee with Indicia of Ownership	184
13. PURCHASERS FROM UNAUTHORIZED VENDEES		§ 250. Where Contract of Sale Void	185
§ 234. General Principles	172	§ 251. When Purchaser has Paid Value	185
§ 235. Innocent Purchaser Cannot Hold Against True Owner	172	§ 252. Stolen Property	185
§ 236. Owner Divested of Property only by Own Act	174	§ 253. Stolen Negotiable Paper	186
§ 237. Possession not Evidence of Right to Sell Chattels	175	§ 254. Purchaser Acquires no Title from Thief	187
§ 238. Purchasers from Pledges and Bailees	176	14. INFANTS	
§ 239. Same Subject	176	§ 255. Where Wrong is Non-performance of Contract	187
§ 240. Same Subject; Rule of		§ 256. Liability as Bailees	188

CHAPTER V

§§ 257-322. WHAT ACTS AMOUNT TO A CONVERSION, Pages 189-234

1. BY WRONGFUL TAKING		§ 261. Chattels Obtained Under Legal Process	193
§ 257. General Statement	190	§ 262. Same Subject; Officer must Follow Commands of Writ	194
§ 258. Manner of Obtaining Possession Immaterial	191	§ 263. Same Subject	194
§ 259. Chattels Obtained by Fraud	191	§ 264. Same Subject; Where Officer Seizes Goods of Stranger	195
§ 260. Same Subject; Re-sale of Chattels	192		

TABLE OF CONTENTS

	PAGE		PAGE
§ 265. Same Subject; Liability of Third Persons	195	2. BY WRONGFUL SALE	
§ 266. Same Subject	196	§ 289. Is Generally a Conversion	210
§ 267. Under Chattel Mortgages	196	§ 290. Purchaser at Wrongful Sale Guilty of Conversion	211
§ 268. Conversion as Against Mortgagor	197	§ 291. Sale Induced by Fraud	212
§ 269. Intermingling or Confusion of Goods	198	3. ASSUMPTION OF OWNERSHIP OR DOMINION	
§ 270. Confusion merely Rule of Evidence	198	§ 292. Wrongful Dominion over Chattels is Conversion	213
§ 271. How Confusion may Occur	199	§ 293. Same Subject; Must be in Defiance of Owner's Rights	213
§ 272. When Confusion by Agreement	199	§ 294. What Interference Sufficient	214
§ 273. Same Subject	200	§ 295. Same Subject; Illustrations	215
§ 274. Where Goods Wrongfully Confused	200	§ 296. Conversion of Part, when Conversion of Whole	215
§ 275. Rights of Owner of Goods Wrongfully Confused	201	§ 297. Owner of Land not Compelled to Deliver Chattels to Owner	216
§ 276. Burden on Wrong-doer to Identify Chattels	201	§ 298. Actual Possession by Wrong-doer not Always Necessary	216
§ 277. Wrong-doer Forfeits Chattels Confused	202	4. BY DESTRUCTION OF PROPERTY	
§ 278. Where Goods may be Identified	203	§ 299. Destruction is Generally a Conversion	217
§ 279. Motive of Wrong-doer Immaterial	203	§ 300. Illustrations of Same Subject	218
§ 280. Rights of Third Persons in Goods Confused	204	§ 301. Where Act Necessary to Protect Property	219
§ 281. Conversion Under Principle of Accession	204	§ 302. Intentional Destruction of Chattels	220
§ 282. Same Subject; Appropriation of Chattels in Good Faith	204	5. BY WRONGFUL DELIVERY	
§ 283. Same Subject	205	§ 303. What Amounts to Conversion	220
§ 284. Whether Title Passes to Innocent Trespasser	206	§ 304. Re-delivery to One Found in Possession	221
§ 285. Same Subject; Remedies of Owner	207	§ 305. Same Subject	221
6. Form or Substance Changed Wilfully	207		
7. Retaking by Vendor After Sale and Delivery	209		
§ 288. Miscellaneous Instances of Wrongful Taking	210		

TABLE OF CONTENTS

	PAGE		PAGE
6. BY AIDING OR ABETTING A WRONG-DOER		9. BY WRONGFUL DETENTION	
§ 306. Third Party may be Equally Guilty with Wrong-doer	223	§ 313. Is Generally a Conver- sion	228
§ 307. Merely Permitting Act of Another is no Con- version	224	10. BY WORDS WITHOUT ACTS	
7. BY WRONGFUL USE		§ 314. When Overt Act Unnec- essary	228
§ 308. Is Generally a Conver- sion	225	§ 315. Illustration of Same Subject	229
§ 309. Illustrations of Same Subject	225	§ 316. Owner's Rights not In- terfered With	230
§ 310. Rightful Use of Chattels is no Conversion	226	11. BY NEGLIGENCE	
8. BY CLAIMING LIEN		§ 317. Negligence Not a Con- version	231
§ 311. Wrongful Claim of Lien a Conversion	227	§ 318. Illustrations of Same Subject	231
§ 312. No Conversion where Possession Rightful	227	§ 319. Same Subject	232
		§ 320. Negligence after Con- version no Defense	233
		12. BY MISCELLANEOUS ACTS	
		§ 321. What Sufficient to Show Conversion	233
		§ 322. Breach of Contract no Conversion	234

CHAPTER VI

§§ 323-382. DEMAND AND REFUSAL, Pages 235-280

1. WHEN DEMAND REQUIRED		§ 332. Where Conversion Pre- viously Occurred	244
§ 323. Where Possession Orig- inally Rightful	236	§ 333. Possession Obtained Under Contract	244
§ 324. Illustrations of Same Subject	237	§ 334. Illustration of Previous Conversions	245
§ 325. Same Subject	238	§ 335. Possession Obtained by One Entitled to It	246
2. WHEN DEMAND UNNECESSARY		§ 336. Demand Useless	247
§ 326. Where Property Wrong- fully Taken	239	§ 337. Same Subject	247
§ 327. Demand Where Conver- sion Otherwise Shown	240	§ 338. Same Subject	248
§ 328. Where Chattels Wrong- fully Seized	241	§ 339. Demand Excused by Act of Defendant	249
§ 329. Possession Obtained by Mistake or Fraud	242	§ 340. Chattels Received under Contract of Sale	249
§ 330. Same Subject; Demand Unnecessary	242		
§ 331. Illustrations of Same Subject	243	3. DEMAND ON PARTICULAR PERSONS	
		§ 341. Officers	250

TABLE OF CONTENTS

	PAGE		PAGE
§ 342. Attached Chattels Mixed with Those of Stranger	250	§ 363. Demand Must be Defi- nite	265
§ 343. Wrongful Purchaser	252	§ 364. Is Sufficient if Intention Understood	265
§ 344. Same Subject	252	§ 365. By Whom Demand Made	266
§ 345. Whether Wrongful Pur- chase is a Conversion	253	§ 366. Demand by Agent	266
§ 346. Same Subject; Is Gen- erally a Conversion Itself	254	§ 367. Demand by Other Per- sons	267
§ 347. Demand on Bona Fide Purchaser	255	§ 368. Upon Whom Demand Made	268
§ 348. Same Subject	256	§ 369. Demand upon Partner	269
§ 349. Same Subject; Good Faith Immaterial	256	§ 370. How Demand Made	269
§ 350. Same Subject	258	§ 371. Demand by Letter	270
§ 351. Some States Hold De- mand Necessary Against Innocent Pur- chaser	258	§ 372. Time and Place of De- mand	270
§ 352. Same Subject	259	§ 373. Same Subject	271
§ 353. Doctrine of these Courts Repudiated	259	5. EFFECT OF DEMAND AND REFUSAL	
§ 354. Bailees	260	§ 374. When Evidence of a Conversion	272
§ 355. Illustrations of Same Subject	260	§ 375. Where Refusal Un- qualified	274
§ 356. Same Subject	261	§ 376. Refusal is Denial of Owner's Rights	274
§ 357. Partners	262	§ 377. When Refusal Insuffi- cient as a Conversion	276
§ 358. Co-tenants	262	§ 378. Same Subject; Refusal Qualified	276
§ 359. Same Subject; Where Actions between Co- owners	262	§ 379. Illustrations of Same Subject	277
§ 360. Agents	263	§ 380. In Case of Lost Prop- erty	278
§ 361. Same Subject; Money Received for Principal	263	§ 381. Refusal by One Unable to Comply with De- mand	278
4. REQUIREMENTS OF DEMAND		§ 382. Who Chargeable by Re- fusal	279
§ 362. General Principles	264		

CHAPTER VII

§§ 383-429. WHO MAY BRING TROVER, Pages 281-313

§ 383. Owner of Special Interest	281	§ 387. Principal and Agent	284
§ 384. Joint-owners	282	§ 388. Principal may Sue Agent and Third Per- sons	284
§ 385. Same Subject; Whether all Owners must Join	283	§ 389. Whether Agent can Sue Third Persons	285
§ 386. Rule that One Joint- owner may Sue Alone	283		

TABLE OF CONTENTS

	PAGE		PAGE
§ 390. Pledgors and Pledges	286	§ 410. Illustrations of Same Subject	301
§ 391. Pledgor against Third Persons	287	§ 411. Officer against Receiptor	301
§ 392. Pledgee against Pledgor	287	§ 412. Finder of Lost Property	302
§ 393. Pledgee against Third Person	288	§ 413. Same Subject	302
§ 394. Bailors and Bailees	289	§ 414. Illustrations of Same Subject	303
§ 395. Bailee against Bailor	290	§ 415. Where Finder of Chattel cannot Sue	304
§ 396. Bailor against Third Person	290	§ 416. Same Subject	304
§ 397. Mortgagor or Mortgagee	291	§ 417. Owner of Lost Property	305
§ 398. When Mortgagee may Sue	292	§ 418. Owner of Stolen Property	305
§ 399. Holders of Commercial Paper	292	§ 419. Owner of Chattels Wrongfully Pledged .	306
§ 400. Same Subject; whether Possession Necessary	293	§ 420. Illustrations of Same Subject	306
§ 401. Lien-holders in General	294	§ 421. Same Subject	307
§ 402. Vendors having Liens	295	§ 422. Lessors and Lessees; Lessors	308
§ 403. Purchaser	296	§ 423. Same Subject	309
§ 404. Officers; under Attachments	297	§ 424. Same Subject; Actions for Fixtures	309
§ 405. Same Subject	297	§ 425. Lessees	309
§ 406. Same Subject	298	§ 426. Same Subject; Where Fixtures Involved .	310
§ 407. Same Subject; Action by Deputy	299	§ 427. Executors and Administrators	311
§ 408. Officer against Another Officer	299	§ 428. Trespasser	311
§ 409. Officers Acting under Executions	300	§ 429. Miscellaneous Instances of Right of Action .	312

CHAPTER VIII

§§ 430-449. TITLE AND POSSESSION NECESSARY, Pages 314-328

§ 430. Absolute Ownership	314	§ 439. Title without Possession	321
§ 431. Same Subject; General Principles	315	§ 440. Illustrations of Same Subject	321
§ 432. What Possession Sufficient	316	§ 441. Action by Owner of Land	322
§ 433. When Absolute Owner cannot Sue	317	§ 442. Same Subject	323
§ 434. Special Interest	317	§ 443. Same Subject; Where Trees Cut	324
§ 435. Illustrations of Same Subject	318	§ 444. When Title without Possession Sufficient	325
§ 436. Equitable Title	319	§ 445. Possession without Title	325
§ 437. Title through Fraud	319	§ 446. Illustrations of Same Subject	326
§ 438. Where Defendant without Title	320		

TABLE OF CONTENTS

	PAGE		PAGE
§ 447. Same Subject; Action by Receptor . . .	326	§ 449. Constructive Possession; when Sufficient	328
§ 448. Action by Possessor against True Owner	327		

CHAPTER IX

§§ 450-558. PLEADING, Pages 329-405

§ 450. General Principles . . .	330	§ 474. Suit by Surviving Partners	345
§ 451. Same Subject	331	§ 475. Illustrations of Same Subject	345
§ 452. Trover Joined with Other Counts	331	§ 476. Joinder of Defendants .	346
§ 453. Election of Remedies by Plaintiff	332	§ 477. Same Subject; Must be Community of Interest	347
§ 454. Same Subject	333	§ 478. Illustrations of Same Subject	347
§ 455. How Far Forms of Action Retained . .	333	§ 479. Joinder of Buyer and Seller	348
§ 456. Jurisdiction of State Courts	334	§ 480. Suit Against Husband and Wife	349
§ 457. Same Subject; Where Conversion in Another State	334	§ 481. Effect of Mis-joinder .	349
§ 458. Same Subject	335	§ 482. Limitation of Time to Sue	349
§ 459. Same Subject	336	§ 483. Same Subject	350
§ 460. Jurisdiction of Justices Courts	336	§ 484. Whether Knowledge Necessary to Start Statute	351
§ 461. Same Subject	337	§ 485. Same Subject	351
§ 462. Jurisdiction of Federal Courts	338	§ 486. Same Subject	352
§ 463. Same Subject	339	§ 487. Complaint, Petition or Declaration; General Theory	354
§ 464. Where Federal Courts have Exclusive Jurisdiction	339	§ 488. Criticism of Rule Recognizing Forms of Action	354
§ 465. Jurisdiction Dependent on Amount Involved	339	§ 489. How Far Forms of Action Retained	355
§ 466. Same Subject; Amount must appear from Complaint	340	§ 490. Title and Possession of Plaintiff	356
§ 467. Venue	341	§ 491. Whether Necessary to Allege Details of Title	357
§ 468. Parties; General Principles	341	§ 492. Alleging Ownership and Possession at Time of Conversion	358
§ 469. Plaintiff; Assignee of Cause of Action . .	342	§ 493. Illustrations of Same Subject	359
§ 470. Same Subject; Rule at Common Law	342	§ 494. Description of the Property	360
§ 471. Suit in Name of Real Party in Interest . .	343		
§ 472. Joinder of Plaintiffs . .	344		
§ 473. Same Subject	345		

TABLE OF CONTENTS

	PAGE		PAGE
§ 495. What Description Sufficient	361	§ 522. Splitting of Actions	381
§ 496. Same Subject	362	§ 523. Amendments of Complaints	382
§ 497. Description must be Reasonably Certain	363	§ 524. Amendments Allowable	383
§ 498. Description Contained in Schedule	364	§ 525. Same Subject	384
§ 499. Value of Property and Damages	364	§ 526. Demurrer	384
§ 500. Sufficient Allegation of Value	365	§ 527. Answer; General Denial	385
§ 501. Allegation of Special Damage	365	§ 528. Same Subject	385
§ 502. Allegation of Acts Constituting Conversion; in General	367	§ 529. Same Subject	386
§ 503. Alleging Conversion by Defendant	368	§ 530. Illustrations under General Denial	387
§ 504. Illustrations of Same Subject	369	§ 531. What Admitted by General Denial	387
§ 505. Alleging Manner of Conversion	369	§ 532. Attacking Plaintiff's Ownership of Right of Possession	388
§ 506. Illustrations of Same Subject	370	§ 533. Same Subject	389
§ 507. Alleging Details of Conversion	371	§ 534. Denial of Act of Conversion	389
§ 508. Whether Fraud should be Alleged	372	§ 535. Same Subject	391
§ 509. Where Malice is Claimed	373	§ 536. Value and Damages	391
§ 510. Wrongful Taking by Defendant	373	§ 537. Same Subject	392
§ 511. Conditions Precedent to Action	374	§ 538. Special Defenses; General Rules	393
§ 512. Demand and Refusal	374	§ 539. Special Plea must Confess and Avoid	393
§ 513. Same Subject	375	§ 540. Plea of Justification	394
§ 514. Same Subject	375	§ 541. Same Subject	394
§ 515. Same Subject	376	§ 542. Doctrine Requiring Justification to be Pled	395
§ 516. Allegation of Demand and Refusal must be Direct	376	§ 543. Plea of Waiver, Estoppel or Ratification	396
§ 517. Where Failure to Allege Demand is Waived	377	§ 544. Same Subject	397
§ 518. Time of Conversion	378	§ 545. Same Subject	397
§ 519. Joinder of Causes of Action	380	§ 546. <i>Res Adjudicata</i>	398
§ 520. Illustrations of Same Subject	380	§ 547. Set-off or Counterclaim	398
§ 521. Same Subject	381	§ 548. Same Subject	399
		§ 549. Same Subject	400
		§ 550. Matters in Mitigation of Damages	400
		§ 551. Same Subject	401
		§ 552. Matters in Justification	402
		§ 553. Statute of Limitations	402
		§ 554. Admissions	402
		§ 555. Amendments	403

TABLE OF CONTENTS

	PAGE		PAGE
§ 556. Reply	404	§ 558. Reply must be Consistent with Complaint .	405
§ 557. Reply must Meet Whole Answer	404		

CHAPTER X

§§ 559-593. WAIVER OF CONVERSION, Pages 406-431

§ 559. General Considerations in Waiving Torts	406	§ 576. Same Subject; Affirming Sale	416
§ 560. Same Subject	407	§ 577. Same Subject	417
§ 561. Same Subject	407	§ 578. Same Subject; Goods Purchased through Fraud	418
§ 562. What is Meant by Waiving Tort	408	§ 579. Where Goods Used but Not Sold	419
§ 563. When Tort may be Waived	408	§ 580. View that Property Need Not have been Sold by Wrong-doer .	419
§ 564. Same Subject	409	§ 581. Same Subject	420
§ 565. When Tort Not Waived	410	§ 582. Same Subject; Waiver is on Theory of Implied Contract	421
§ 566. When Promise Necessary in Waiving Tort	410	§ 583. Same Subject	422
§ 567. Agreement to Pay Implied	411	§ 584. Same Subject; Where Property Severed from Realty	423
§ 568. Who may Waive a Tort	412	§ 585. Same Subject	423
§ 569. General Principles in Waiving Conversion .	413	§ 586. Same Subject	424
§ 570. Where Owner Accepts Return of Property .	413	§ 587. Same Subject	425
§ 571. Acquiescence in Wrongful Act	414	§ 588. Same Subject	425
§ 572. Demand for Return of Property	415	§ 589. Effects of Waiver . .	426
§ 573. Release from Liability .	415	§ 590. Same Subject	427
§ 574. Suing in Assumpsit; View that Property must have been Sold	415	§ 591. Whether Election of One Remedy Waiver of Others	427
§ 575. Same Subject; Where Money Converted .	416	§ 592. Same Subject	428
		§ 593. Same Subject	429

CHAPTER XI

§§ 594-629. EVIDENCE, Pages 432-457

1. BURDEN OF PROOF		§ 598. Possession or Right of Possession	435
§ 594. As to Title	432	§ 599. Same Subject	436
§ 595. Same Subject	434	§ 600. Same Subject	436
§ 596. Special Interest of Plaintiff	434	§ 601. Various Rulings on Burden of Proof . .	437
§ 597. Same Subject	435		

TABLE OF CONTENTS

	PAGE		PAGE
2. PRESUMPTIONS		§ 614. Illustrations of Same Subject	447
§ 602. Possession Presumes Title	438	§ 615. Plaintiff's Title or Right of Possession	448
3. MANNER OF PROOF		§ 616. Illustrations of Same Subject	448
§ 603. General Principle . .	439	§ 617. Same Subject	449
§ 604. Parol or Documentary Evidence	440	§ 618. Defendant's Title and Right of Possession .	450
§ 605. Acts and Declarations .	441	§ 619. Same Subject	451
§ 606. Same Subject; Self-serving Declarations .	442	§ 620. Defendant's Title Acquired while Suit Pending	451
§ 607. Same Subject	443	§ 621. Title and Right of Possession of Third Persons	452
4. ADMISSIBILITY OF EVIDENCE		§ 622. Same Subject	452
§ 608. Motive and Good Faith of Defendant	443	§ 623. Same Subject	453
§ 609. Same Subject	444	§ 624. Same Subject	453
§ 610. Same Subject	445	§ 625. Whether Proof of Tortious Act Necessary .	454
§ 611. Other Similar Acts by Defendant	445	§ 626. Illustrations of Same Subject	455
§ 612. Indictment or Acquittal of Defendant on Criminal Charge . .	446	§ 627. Property Restored by Defendant	455
§ 613. Identity of Chattels Involved	446	§ 628. Same Subject	456
		§ 629. Variance from Pleading	456

CHAPTER XII

§§ 630-700. MEASURE OF DAMAGES, Pages 458-530

1. GENERAL PRINCIPLES		§ 637. Action between Co-tenants	468
§ 630. Value of Property with Interest	459	3. RECOUPMENT WHERE DEFENDANT OWNER OF SPECIAL INTEREST	
§ 631. Same Subject; Illustrations	461	§ 638. Recoupment goes in Mitigation	469
§ 632. Same Subject; Property Never in Existence .	462	§ 639. When Recoupment Allowed	470
§ 633. Same Subject	462	§ 640. Same Subject	471
2. WHERE PLAINTIFF OWNER OF SPECIAL INTEREST		§ 641. Same Subject; Deducting Amount due Defendant	472
§ 634. Recovery Limited to Value of Special Interest	464	4. VALUE	
§ 635. Same Subject	465	§ 642. Market Value	472
§ 636. Illustrations of Special Interests	467	§ 643. How Market Value Determined	473

TABLE OF CONTENTS

	PAGE		PAGE
§ 644. Whether Wholesale or Retail Value Taken . . .	475	§ 668. Same Subject; Conversion of Timber . . .	500
§ 645. Place of Fixing Value . . .	475	§ 669. Same Subject . . .	501
§ 646. Market Value at Place of Conversion . . .	476	§ 670. Same Subject; Where Wrong Willful . . .	502
§ 647. Market Value of Goods in Transit . . .	477	§ 671. Actions Against Purchaser from Wrongdoer . . .	503
§ 648. Time of Fixing Value . . .	478	§ 672. Value of Use of Converted Property . . .	504
§ 649. Time of Conversion Usually Governs . . .	481		
§ 650. Exceptions to General Rule . . .	481	6. INTEREST	
§ 651. Property of Fluctuating Value . . .	482	§ 673. Why Interest Allowed from Time of Conversion . . .	505
§ 652. Same Subject; Holding of New York Courts . . .	484	§ 674. From what Time Interest Computed . . .	506
§ 653. Same Subject . . .	485		
§ 654. Same Subject . . .	486	7. RE-PURCHASE BY OWNER AFTER CONVERSION	
§ 655. Same Subject . . .	488	§ 675. Damage is Usually Amount Paid . . .	507
§ 656. Same Subject; What is Reasonable Time after Conversion . . .	489	§ 676. Same Subject . . .	507
§ 657. Same Subject; Rule in Other States . . .	489	§ 677. Re-purchase Equivalent to Return . . .	508
§ 658. Views of Sedgwick as to Rule where Value Fluctuates . . .	491		
§ 659. Property Without Market Value . . .	492	8. AMOUNT RECEIVED FROM SALE BY DEFENDANT	
§ 660. Same Subject; Damages Measured by Actual Value . . .	492	§ 678. Generally no Criterion of Damages . . .	509
5. VALUE ENHANCED BY WRONGDOER		9. CONFUSION OF GOODS	
§ 661. General Principles . . .	494	§ 679. Effect of Good Faith on Measure of Recovery . . .	510
§ 662. Recovery of Enhanced Value . . .	494	§ 680. Where Gas or Oil Intermingled . . .	511
§ 663. Same Subject . . .	495		
§ 664. Recovery of Value at Time of Conversion less Cost of Improvements . . .	496	10. FOR CONVERSION OF MORTGAGED CHATTELS	
§ 665. Same Subject . . .	497	§ 681. In Favor of Mortgagee . . .	511
§ 666. Recovery Affected by Mistake or Bad Faith of Defendant . . .	498	§ 682. In Favor of Mortgagor . . .	512
§ 667. Conversion of Coal or Ore . . .	499		
		11. WHERE PLEDGED PROPERTY CONVERTED	
		§ 683. Damages in Favor of Pledgor . . .	513
		§ 684. Damages in Favor of Pledgee . . .	514
		§ 685. Collateral Security . . .	515

TABLE OF CONTENTS

	PAGE		PAGE
12. UNDER CONDITIONAL SALES		15. SPECIAL DAMAGES	
§ 686. Where Purchase Price Partly Paid . . .	515	§ 693. General Rule as to Special Damages . . .	523
13. CORPORATE SHARES		§ 694. Where Property Wrongfully Seized under Attachment or Execution	524
§ 687. Where Corporation Refuses to Transfer Stock or Otherwise Converts It	516	§ 695. Same Subject	525
§ 688. Where Conversion is by an Individual . . .	517	§ 696. Expenses of Following or Recovering Chattels	526
14. DAMAGES AGAINST CARRIERS		§ 697. Punitive Damages .	527
§ 689. For Loss or Non-delivery of Goods . .	518	16. MITIGATION OR REDUCTION OF DAMAGES	
§ 690. Wrongful Delivery by Carrier	519	§ 698. General Principles of Mitigation	528
§ 691. Damages for Deviation from Instructions . .	520	§ 699. What may be Shown to Reduce Damages .	529
§ 692. Miscellaneous Property	521	§ 700. Same Subject: Return and Acceptance of Property	529

CHAPTER XIII

§§ 701-709. TRIAL, Pages 531-536

§ 701. Questions for the Court	531	§ 705. Same Subject	533
§ 702. Permitting Property to be Brought into Court	531	§ 706. Province of Jury . .	534
§ 703. Instructions	532	§ 707. Verdict and Findings .	535
§ 704. Same Subject	533	§ 708. Judgment	535
		§ 709. Effect of Judgment . .	536

CHAPTER XIV

§ 710. APPEAL AND ERROR, Page 537

§ 710	537
-----------------	-----

INDEX	539
-----------------	-----

TABLE OF CASES CITED

[References are to pages.]

A

Abbott v. Blossom.....	423	Alford v. Davenport.....	226, 275
v. Kimball.....	219, 233	Alger v. Farley.....	104
Abraham v. Alford.....	534	Allen v. Am. Bl. & Loan Assoc. .	125
v. Bank.....	14	v. B. & L. Assoc.....	16
v. Nunn.....	76, 278	v. Chicago Co.....	473
Acheson v. Miller.....	536	v. Doyle.....	298
Acker v. Bender.....	102	v. Dubois.....	16, 37, 57
Adams v. Abbott.....	54, 196	v. Fox.....	332
v. Bissell.....	380	v. Harper.....	165
v. Blankenstein.....	69, 520	v. Kinyon.....	460, 481, 505
v. Castle.....	245, 374	v. Kirk.....	203
v. Clark.....	93	v. McMonagle.....	191, 213
v. Davis.....	440	v. Mille.....	352
v. Elseffer.....	445	v. Ogden.....	267
v. Goddard.....	19	v. Randolph.....	427
v. Kellogg.....	441	v. So. Boston Co.....	517
v. Loomis.....	241	v. Toner.....	364
v. Mizell.....	213	v. Watson.....	311
v. Sturges.....	154	Alley v. Gamlick.....	338
v. Weir.....	226	Allgear v. Walsh.....	228
Adamson v. Peterson.....	512	Alliance Trust Co. v. Nettleton	324
Addington v. Littleton.....	137	Allison v. King.....	226
Adkins v. Blakes Adm.	305	v. Mathiew.....	445
Adleberg v. Horowitz.....	327	Allsopp v. Joshua.....	354
Agars v. Lisle.....	273	v. Wash. Works... .	191, 214, 478
Agnew v. Johnson.....	170, 366	Alter v. Bank.....	8, 354
Aikin v. Buck.....	25	Altes v. Hinckler.....	383
Ainsworth v. Bowen.....	58	Amberg v. Philbrick.....	268
v. Partillo.....	51, 264	Ambrecht v. Mathews.....	22
Aitken v. Wells River....	139, 146	Ament v. Greer.....	101
Akron Co. v. Bank.....	308	Am. Co. v. Milk.....	89
Alabama etc. Ry. Co. v. Kidd..	70	Am. Ex. Co. v. Fletcher.. . . .	91
Ala. Cot. Co. v. Myrick.....	534	v. Greenhalgh.....	84, 88
Ala. Nat'l Bank v. Mobile Road	88	v. Lessem.....	520
Albee v. Cole.....	313	Am. Print Works v. Lawrence..	146
Albert v. Linden.....	511	Am. Soda Co. v. Futrall.....	459
Alderman v. East.....	86	Ames v. Palmer.....	315, 317
Alderson v. Ry. Co. .17, 29, 340,	366	Amory v. McGregor.....	520
Aldrich v. Wright.....	4	Anchor Mill Co. v. Burl. Road..	88
Aldrich Min. Co. v. Pearce.....	323	Anderson v. Agnew.....	246, 389
Alexander v. Mahon.....	302	v. Baker.....	437
v. Meyenberg.....	319	v. Besser.....	22, 445
v. Relfe.....	106	v. Bowles.....	294, 308
v. State.....	153	v. Case.....	103
v. Swockhamer.....	185, 192	v. Gouldberg.....	312
v. Zeigler.....	310	v. Kinchelor.....	438
Alferitz v. Borgwaldt.....	99	v. Nicholas.....	16, 31, 187
		v. Sloane.....	525
		Andrews v. Carl.....	238, 239, 350

TABLE OF CASES CITED

Andrews v. Durant.....	481	Backenstrass v. Stahler.....	5, 470
v. Shattuck.....	246	Bacon v. Kimmell.....	536
v. Shaw.....	321	v. Thorp.....	298
Androscooggin Co. v. Metcalf....	407	Badger v. Batavia P. Co.....	269
Anoka Bank v. St. Croix Co....	358	v. Hatch.....	50, 226, 260
Anson v. Dwight.....	27	Badlam v. Tucker 297, 299, 311,	326
Appleton Mill Co. v. Warder.....	100, 196	Baehr v. Downey.....	322
Argyle, The v. Worthington....	87	Bahr v. Baley.....	5, 20
Ark. etc. Bank v. Cassidy.....	48	Bailey v. Adams.....	193
Armitage v. Kistler.....	310	v. Colby.....	68, 225
Armory v. Delamire... 202, 303,	510	v. Glover.....	353
v. Flynn.....	26, 304	v. Godfrey.....	512
Armstrong v. Dubois.....	196	v. Northrup.....	232
Arnes v. Palmer.....	328	v. Shaw.....	202, 510, 518
Arnold v. Delano.....	296	Baird v. Howard.....	192
v. Hollenbake.....	179	Baker v. Barn.....	315, 372
v. Kelley.....	445	v. Beers.....	2, 229, 300
Arpin v. Burch.....	206, 284	v. Drake.....	35, 486
Arrington v. Ry. Co.....	484	v. Flint.....	396
v. Wilmington etc. Co... 519,	520	v. Freeman.....	508
Arrowsmith v. Gordon.....	481	v. Fuller.....	298
Arthur v. Chicago.....	200	v. Kansas City Co.....	191, 460
Ascherman v. Kimball.....	219	v. Malone.....	367
Ashby v. Port Huron.....	136	v. Meisch.....	206
Asher v. Reizenstein.....	210	v. Moulthrop.....	219
Ashmead v. Kellog.....	292	v. Sheeler.....	207
Ashton v. Allen.....	192	v. Slavey.....	319, 342, 356
v. Heydenfeldt.....	275, 369	v. Wasson.....	45
A. T. & S. F. Co. v. Atchison		v. Wheeler.....	23, 495, 533
Grain Co.....	352	Balch v. Jones.....	165
v. Lawler.....	518	v. Patton.....	417
v. Schrivener.....	64, 225	Baldwin v. Bradley.....	288
v. Tanner.....	219, 402	v. Cole.....	273
Atisfield v. Mayberry.....	14	v. McKay.....	448
Atkins v. Gamble.....	16, 37	v. Potter.....	509
Atkinson v. Jones.....	51, 68	v. Whittier.....	194
Atl. Coast Co. v. Hinely etc. Co.	521	Baley v. Hervey.....	427
Atl. etc. v. Howard S. Co.....	519	Ball v. Campbell.....	529
Attersoll v. Briant.....	97	v. Larkin.....	269
Atwater v. Tupper.....	536	v. Liney.....	75, 529
Auffing v. Perkins.....	353	v. Patterson.....	360, 364
Auld v. Butcher.....	236, 350	Ballamy v. Doud.....	102
Aultman v. Mallory.....	182	Ballard v. Burgett.....	181
Austin v. Van Loon.....	239, 350	Ballentine v. Joplin.....	223
Author v. Wilson.....	388	Ballou v. Hale.....	156, 171
Averill v. Chadwick.....	29	Baltimore Ins. Co. v. Dalrymple	
v. Williams.....	55	470, 482, 513, 516	
Avery v. Chenons.....	30, 439	Baltimore, etc. Ry. Co. v.	
Ayer v. Bartell.....	381	O'Donnell... 3, 92, 190, 370,	
Ayers v. French... 16, 120, 212,	296	375, 456, 460	
v. Hixon.....	199, 204, 510	Baltimore Ry. Co. v. Church... 106	
v. Hobbs.....	503	v. Pumphrey.....	520
v. Hubbard.....	207, 503	v. Sewell.....	118, 517
Aylesbury Mer. Co. v. Fitch... 106,		Bane v. Detrick... 150, 215, 241,	348
197, 530		Bangor Co. v. Robinson.....	187
		Bank v. Fiske.....	246
		v. Lanier.....	108
		v. Leavitt.....	507
		v. Masonic Hall.....	33
		v. McNeill.....	122
		v. Moore.....	99
		Bank of B. v. N. Y. Co.....	86

B

Baales v. Stewart.....	396
Babcock v. Caldwell.....	359
v. Gill.....	494
v. Trice.....	400

TABLE OF CASES CITED

Bank of C. v. Bank of F.....	516	Bedford v. Flowers.....	225
v. Bissell.....	87, 92	Beebe v. Knapp.....	372, 381
Bank of Holly S. v. Pinson.....	116	Beecher v. Denniston.....	460
v. Schleissinger.....	2, 369	Beede v. Lamphrey....	22, 23, 460,
Bank of N. B. v. Neilson.....	362		498, 501
Banner v. Lumber Co.....	534	v. Macomber.....	449
Banton v. Shovey.....	20	Beers v. Waterbury.....	102
Barber v. Ellingwood.....	489	Begale v. Smith.....	195
Barfield v. Whipple.....	223	Belcher v. Livestock Co.....	199
Barker v. Dinsmore.....	185, 192	Belden v. Perkins.....	37, 39, 176
v. Lewis Co.....	316	Bell v. G. Ober Co.....	391
v. Miller.....	301, 327	v. Lyman.....	163
v. Storage Co.....	493	v. Marriott.....	351
Barley v. Cannon.....	396	v. Perry.....	536
Barlow v. Stalworth.....	417	v. Summings.....	415
Barnard v. Campbell.....	185	Benedict v. Howard.....	165, 167
Barnes v. Swift.....	288	Benesch v. Wagner.....	372
v. Williams.....	352	Benner v. Feige.....	452
Barnett v. Thompson.....	490	v. Howard's Ex.....	261
Barney v. Dudley.....	472, 522	Bennett v. Express Co.....	95
Barrante v. Garrett.....	460	v. Gilbert.....	468, 532
Barrelett v. Bellgard..	366, 456, 530	v. Herring.....	350
Barrett v. Mobile.....	6, 219, 391	v. Hood.....	382
v. Warren.....	258	v. Lockwood.....	526
Barron v. Davis.....	349	v. Thompson.....	498
Barrow v. Paxton.....	59	Benoir v. Pequin.....	374
Barry v. Bennett.....	102	Benson v. Berry.....	300
Barstow v. Min. Co.....	30, 31	v. Eli.....	12, 364, 532
v. Savings Co.....	187	Benson Co. v. Alta Co.....	25
Bartels v. Kinninger.....	264	Bent v. Hoxie.....	202
Barth v. Bank.....	518	Benton v. Beattie.....	384, 444
Bartlett v. Hoyt.....	242, 282	Bereich v. Mayre..	31, 48, 187, 517
Bartley v. Rogers.....	191	Beren v. Taylor.....	423
Barton Coal Co. v. Cox....	498, 499	Bergin v. Hayward.....	193
Barwick v. Barwick.....	453	Berlin v. Eddy.....	37
v. Rackley.....	211	Berman v. Kling.....	217, 232
v. Wood.....	453	Berney v. Drexel.....	344, 356
Bass v. Pierce.....	289	Bernstein v. Walker.....	535
Batell v. Crawford.....	371, 374	v. Warland.....	368, 375
Bateman v. Ryder.....	30, 492	Berry v. Dwinel.....	477
Bates v. Callender.....	5, 527	v. Ingalls.....	527
v. Clark.....	525, 530	Berson v. Levy.....	239
v. Stansell.....	484	Bertrand v. Taylor.....	156
v. Wilbur.....	292	B. B. Ford Co. v. Lawson.....	477
Baun Iron Co. v. Bank.....	535	Bettes v. Maygoon.....	449
Bayard v. Bank.....	109, 128	Betts v. Lee.....	23, 205, 494
Baylis v. Cronkite.....	446	v. Mouser.....	313
Beaman v. Stewart.....	460	Bever v. Swecker.....	8
Bean v. Schmidt.....	300	Beyer v. Bush.....	289
Bearce v. Bowker.....	256	Beyersdorf v. Sump.....	528, 529
Beard v. Westerman.....	104	Bibb v. Roth.....	433
Bears v. Preston.....	104	Biddle v. Bayard.....	187
Beasley v. Bradley.....	380	Bierbach v. Goodyear.....	525
Beaton v. Wade.....	455	Biering v. Bank.....	525
Beaty v. Swartout.....	386, 395	Bigelow Co. v. Heintze.....	530
Bechtel v. Chase.....	426	Billings v. Tucker.....	289, 318
Becker v. Bailies.....	513	Bircher v. Parker.....	215, 310
v. Dunham.....	511	Bird v. Clark.....	317
v. Feigenbaum.....	377, 481	v. Railway Co.....	9, 341, 518
Beckham v. Burney.....	400	v. Womack.....	289
Beckley v. Munson.....	104	Birdsall v. Davenport.....	51, 64,
Bedell v. Janney.....	263		214, 344

TABLE OF CASES CITED

Birmingham Co. v. Coal Co.	504	Boutwell v. Harriman.	214
Bishplinghoff v. Baner.	349	v. Parker.	291, 490
Bissel v. Drake.	365	Bowdish v. Page.	312
Bissell v. Pearse.	227, 404, 440	Bowditch v. Boston.	148
Bixel v. Bixel.	356, 380, 456, 457	Bowen v. Fenner.	216
Blach v. Creditors.	524	v. Sanborn.	53, 353
Black v. Black.	13	v. Sullivan.	303
v. Elevator Co.	294	v. Teall.	530
Blackie v. Neilson.	360	Bower v. Bower.	532
Blackman v. Lehman.	29	Bowers v. Bodley.	103
Blackmer v. Ry. Co.	472, 477, 534	Bowie v. Napier.	307
Blackshear v. Burke.	412	Bowker v. Goodwin.	48
Blaen Avon Co. v. McCulloh.	499	Bowman v. Eaton.	272
Blaisdell v. Scally.	537	Boyce v. Brockway.	3, 254
Blair v. Riddle.	379	v. Williams.	452
Blair Co. v. Rose.	118	Boyd v. Brown.	525
Blake v. Coates.	310	Boylan v. Huguet.	16, 37, 57,
v. Johnson.	194	121, 481, 490, 516	
v. Milliken.	283	Boyles v. Cronkite.	446
Blakely v. Douglass.	316	Boylston Ins. Co. v. Davis.	476
v. Ruddell.	257	Boxell v. Robinson.	275, 532
Blanchard v. Gas Co.	117	Bozeman v. Shaw.	525
Blankenship v. Berry.	217	Bracelin v. McLaren.	19
Blanvelt v. Fechtman.	101	Bradeen v. Brooks.	185
Blewett v. Miller.	509	Bradfield v. Patterson.	424
Bliss v. Cuttle.	372	Bradley v. Barin.	475
v. Whitney.	309	v. Burkett, etc. Assoc.	514
Bliven v. Hudson Co.	95, 97	v. Harden.	505, 506
Blocker v. Smith.	337	v. Parker.	66
Blodgett v. Adams.	300	v. Parks.	66
v. Seals.	202	v. Spofford.	73, 443
Blum v. Langfield.	394	Bradley Land Co. v. Mfg. Co.	464
Blumenthal v. Brainerd.	519	Brady v. Whitney.	536
Blydenburgh v. Welsh.	473	Branch v. Morrison.	29, 328
Boatman's Bank v. Western Co.	88	Brandon v. Planters etc. Bank.	303
Boaz v. Terrell.	202	Brass v. Worth.	36, 59
Bodenheimer v. Newsom.	288	Braswell v. McDaniel.	52, 239
Bodeyea v. Perkerson.	53, 530	Bratton v. Langert.	101
Bodick v. Coburn.	256	Bray v. Bray.	156
Bogan v. Wilburn.	536	v. Flickinger.	448
Boies v. Hartford.	75	Brearily v. Cox.	18
Bolander v. Gentry.	451	Breck v. Blanchard.	52
Boline v. Nye.	2, 85, 219, 232	Breckenridge v. McAfee.	30
Bolles Co. v. U. S.	207, 503	Breeland v. Ritter.	532
Bolling v. Kirby.	2, 5, 210, 214,	Breese v. Bange.	265
223, 237, 454		Brent v. Kimball.	27
Bonaparte v. Clagett.	246	Brewster v. Silliman.	456, 530
Bond v. Mt. Hope Co.	17	v. Vail.	301, 326
v. Ward.	238, 248, 250	v. Van Liew.	482
Bonelli v. Bowen.	524, 527	Brian v. Strait.	300
Boobier v. Boobier.	5, 217, 224, 283	Brice v. Vanderheyden.	341
Booth v. Powers.	392, 446	Bricker v. Hughes.	20
v. Terrell.	289	Brickley v. Walker.	356, 396, 533
Boothe v. Estes.	272	Bridges v. Paige.	389
Boreland v. Stokes.	126, 234	Briggs v. Boston Co.	212
Boss v. Glover.	85	v. Boston Col.	93, 97
Boston Ry. Co. v. Richardson.	517	v. Brown.	393
Botsford v. Murphy.	104	v. Hancock.	75, 275
Bott v. McCoy.	285	v. Kennett.	516
Bourch v. Platt.	239	v. Ry. Co.	470
Bourne v. Ashby.	477	Briggs Iron Co. v. No. Adams	
Boutell v. Warne.	472, 516	Iron Co.	415

TABLE OF CASES CITED

Brigham v. Adams.....	474	Bucklin v. Beale.....	256
v. Hawley.....	472	Buckmaster v. Smith.....	509, 516
Brighton Bank v. Sawyer.....	470	Budd v. Street Ry. Co.....	17, 119,
Brinck v. Freoff.....	512	126, 490, 517	
Bringard v. Stellwagen....	348, 471	Buel v. Pumphrey.....	258, 267, 274
Brink v. Decker.....	301	Buffington v. Clark.....	236, 278
Brinkmeyer v. Evansville.....	147	Bugbee v. Allen.....	447
Brinmian v. Baker.....	358	Bulkeley v. Morgan.....	427
Brinsmead v. Harrison.....	536	v. Welch.....	61, 62
Brisbem v. Wilson.....	257	Bull v. Matthews.....	380
Bristol v. Burt.....	2, 216, 229	Bullard v. Bank.....	111
British Co. v. Sibley.....	526	v. Stone.....	477
Brizendine v. Frankfort.....	283	v. Thorpe.....	381
Broadwell v. Conga.....	380	Bullock v. Delaware etc. Co....	98
Brook v. Smith.....	209	Bunger v. Roddy.....	11, 245, 260
Brockover v. Esterly.....	292	Bunnell v. Stern.....	76
Brooke v. Lowe.....	445, 531	Buntin v. Pritchett.....	374
Brookly Co. v. Bank.....	186	Burbank v. Crooker.....	176, 183
Brooks v. Ashburn.....	223	Burch v. Hardwick.....	140
v. Rogers.....	460, 478	Burditt v. Hunt.....	46, 70, 221
Brothers v. Hurdle.....	324	Burgin v. Burgin.....	292
Broughton v. Winn.....	446	Burke v. Holmes.....	532
Broussard v. Sells-Floto Shows .	28	v. Webb.....	357, 467, 469, 472,
Browder v. Phenney.....	234, 532	514	
Brower v. Peabody.....	87	Burnham v. Lockwood.....	489
Brown v. Bacon.....	199	v. Marshall.....	248
v. Bearson.....	261, 282	v. Pidecock.....	7
v. Bome.....	313	Burns v. Clark.....	303
v. Boyce.....	455	v. Winchell.....	170
v. Calumet Co.....	473	Burris v. Johnson.....	220
v. Campbell Co.....	5	Burrows v. Keays.....	313, 362
v. Carroll.....	54	Burrus v. Shoemaker.....	490
v. Dempsey.....	289, 319	Burt v. Decker.....	368
v. Ela.....	216	v. Deutcher.....	319, 326
v. Girader.....	136	Burton v. Burton.....	163
v. Leath.....	507	v. Cuyrea.....	308
v. Neal.....	529	v. Randall.....	469, 512
v. Noel.....	275	v. Wilkinson.....	70
v. Shaw.....	454	Busch v. Fisher.....	206
v. Sox.....	494	Bush v. St. Louis, etc. Co....	87, 90
v. St. Charles.....	14	Butler v. Borders.....	54
v. Union, etc. Assoc.....	514	v. Jones.....	74, 276
v. Waterman.....	437	v. Lee.....	101
Brundage v. Camp.....	181	v. Page.....	309
Bruner v. Dyball.....	241, 243	Butte Co. v. Vaughn.....	203
Brunswick v. U. S. Ex. Co.....	91	Butts v. Burnett.....	38, 60, 271
Brunswick etc. Co. v. Brackett .	356	v. Collins.....	62
Brush v. Herlihy.....	350	Bynum v. Gary.....	535
Bryan v. Baldwin.....	512		
v. Hampton.....	319		
Bryant v. Cogdon.....	200		
v. Kenyon.....	211, 431		
v. Pugh.....	537		
v. Ware.....	199		
Bryden v. Croft.....	360, 361, 367, 378		
Bryman v. Baldwin.....	36, 58		
Bryne v. Weidenfeld.....	321		
Bryson v. Rayner.....	33, 36, 60, 286		
Buchanan v. Smith.....	64, 71		
Buck v. Ashby.....	232		
v. Kent.....	14, 15		
Buckley v. Walker.....	291		

C

Cairns v. Blecher.....	51
Calais v. Whidden.....	416
Caldwell v. Arnold.....	53
v. City of Boone.....	140
v. Ryan.....	211
Calhoun v. Thompson.....	68
Cal. Cured Fruit Assoc. v. Ainsworth.....	465
Calkins v. Lockwood.....	347
Callis v. Woddy.....	352
Calvin v. Bacon.....	177

TABLE OF CASES CITED

Camp v. Casey	234	Cavanaugh v. Boston	134, 246, 265
Campbell v. Brown	308	Cavin v. Gleason	129
v. Chamberlin	525	Caywood v. Van Ness	212
v. Goggs	353	Cecil v. Clark	460, 505
v. Leonard	101	Cent. Coal Co. v. Shoe Co.	460
v. Stokes	73	Cent. Ry. Co. v. Lamphrey	231
v. Vining	353	v. Smith	106
v. Woodworth	474	C. E. Sharp Co. v. Kan. Co.	334
Canadian Bank v. McCrea	295	Center Turnpike Co. v. Smith	416
Canfield v. Minn. Assoc.	36, 60	Cerkel v. Waterman	31, 49, 234
Canifax v. Chapman	196	Cernahan v. Chrisler	5, 530
Canning v. Owen	464	Cerry v. Paxton	475
Cantling v. Hannibal Ry. Co.	27	Chaffee v. Mackenzie	525
Capewood v. Taylor	535	Chaffin v. Cont. Co.	203
Capron v. Porter	203	Challis v. Wylie	425
Carey v. Bright	256, 277, 527, 528	Chamberlain v. Shaw	467, 514, 528
v. Dazy	395	v. Woolsey	346
Carey Litho. Co. v. Book Co.	473	Chambers v. Lewis	427
Carlisle v. Burley	536	Chamblee v. McKenzie	419
Carlor Oil Co. v. Franzell	473	Chambless v. Livingston	275
Carlyon v. Lanman	392, 403	Chandler v. DeGraff	199-202
Carmichael v. Buck	180	Channon v. Lusk	309
Carner v. Mackintosh	54	Chapman v. Brooks	56
Carney v. Rease	28	v. Burt	264
Carpenter v. Am. B. & L. Assoc.	16, 456	v. Cole	175, 256
v. Carpenter	427, 443, 452	v. Hudson	350
v. Wilson	333	Chappel v. Puget Sound Co.	22, 532
Carper v. Risdon	247, 265, 275, 349	Charles, etc. Co. v. Logue	306
Carr v. Clough	279	Charter v. Stevens	105
v. Dodge	158, 270	Chase v. Blaisdell	272, 509
v. Farley	268	v. Corcoran	302
Carrie v. Cloverdale Co.	465, 468	v. Snow	526
Carrier v. Chicago, etc. Co.	353	v. Whitney	285
Carrington v. St. Louis	138	Cheshire Ry. Co. v. Foster	318
Carroll v. Bank	60, 111, 113	Chew v. Bank	110
v. Fethers	397	v. Loucheim	29
v. Mix	74, 217, 278	Chicago v. Turner	132, 134
Carson v. Smith	527	Chicago Bank v. Cox	412
Carter v. Bennett	312, 325, 437, 452	Chicago Co. v. Savannah Co.	88
v. Du Pre	490	Chicago etc. Co. v. Dickson	518
v. Feland	481	Chickering v. Raymond	342
v. Goode	335	Chism v. Woods	177
v. Kingman	211, 436	Chittenden v. Pratt	422, 426
v. Lehman	226	Chope v. Eureka	139
Carver v. Creque	29	Chouteau v. Allen	35
Casey v. Ballou B. A. Co.	447, 524, 527, 528	Cincinnati v. Evans	525
Caspary v. Portland	364	Citizens B. v. Tiger Co.	334
Cass v. Higenbotam	33, 183	Citizens Bank v. Mill Co.	354
v. N. Y. Cent., etc. Ry. Co.	268	Citizens Co. v. Robbins	490, 518
Cassidy v. Slemmons	239	City of A. v. East	139
Cassin v. Marshall	460	City of B. v. Ry. Co.	85
Castle v. Bank	246, 265	Clandenning v. Hawk	403
v. Bullard	150, 153	Clapp v. Campbell	380
v. Ford	196	v. Glidden	316, 359, 451, 453
Caswell v. Putney	37, 59	v. Nelson	261
Cate v. Fife	440	Clare v. Johnson	493
Cather v. Damerell	455	Clark v. Bates	530
Caulkins v. G. & L. Co.	108, 127, 469, 481	v. Bell	464, 467
Cavallaro v. Texas Co.	89	v. Chicago	137
		v. Clement	516
		v. Dean	315

TABLE OF CASES CITED

Clark <i>v.</i> Dearborn	472	Collins <i>v.</i> Bennett	28
<i>v.</i> Draper	321	<i>v.</i> Bowen	325
<i>v.</i> Eureka Bank	516	<i>v.</i> Burns	70
<i>v.</i> Hale	271, 274	<i>v.</i> Gilbert	300
<i>v.</i> Houghton	440	<i>v.</i> Lowrey	126, 413
<i>v.</i> Lowell Co.	93	<i>v.</i> Smith	401
<i>v.</i> Lumber Co.	455	<i>v.</i> State	54
<i>v.</i> Mallory	318	Col. Bank <i>v.</i> Brown	316, 341
<i>v.</i> Monroe Co.	202	<i>v.</i> Surety Co.	325
<i>v.</i> Reeder	352	Col. Co. <i>v.</i> Turek	25
<i>v.</i> Rideout	211	Col. Fuel & Iron Co. <i>v.</i> Chap-	
<i>v.</i> Wells	29, 211, 212	pell	405
<i>v.</i> Whitaker	191, 223, 481	Colt <i>v.</i> Owens	489
Clay <i>v.</i> Siher	369	Columbian M. Co. <i>v.</i> Bank . . .	13, 533
<i>v.</i> Sullivan	306	Columbus Co. <i>v.</i> Hurford	284
Clegg <i>v.</i> Boston	70	Com. Bank <i>v.</i> Hurt	306
Clelland <i>v.</i> Nichols	388	<i>v.</i> Pierce	228
Clement <i>v.</i> Duffy	209	Commonwealth <i>v.</i> Morse	327
Clements <i>v.</i> Yturria	328	Comparet <i>v.</i> Burr	15
<i>v.</i> Barrows	380	Comstock <i>v.</i> Hier	14, 213
Cleveland <i>v.</i> Schaefer	521	Cone <i>v.</i> Forest	195
Cleveland etc. Co. <i>v.</i> M. P. Co. .	84	<i>v.</i> Iverson	223, 347, 365
Cleveland Ry. Co. <i>v.</i> Wright . .	390, 394	Congar <i>v.</i> Chicago Co.	520
Clink <i>v.</i> Gunn	244	Conklin <i>v.</i> Botsford	405
Close <i>v.</i> Hodges	100	Conlan <i>v.</i> Latting	191
Closson <i>v.</i> Morrison	534	Connah <i>v.</i> Hale	2, 191, 214, 310
Clow <i>v.</i> Gilbert	300	Conner <i>v.</i> Allen	3, 231, 454
Clowes <i>v.</i> Hawley	522	<i>v.</i> Bludworth	359
Coad <i>v.</i> Home Cattle Co.	105	Connor <i>v.</i> Hillier	17, 518
Coal Creek Co. <i>v.</i> Moss	499	Connoss <i>v.</i> Meir	364, 393, 403
Cobb <i>v.</i> Barber	349	Conrad <i>v.</i> Fisher	295
<i>v.</i> Crane Gay, <i>et al.</i>	18	<i>v.</i> La Rue	126
<i>v.</i> Wallace	414	Conrow <i>v.</i> Little	408
<i>v.</i> Whitsett	474	Continental Co. <i>v.</i> Bliley . . .	17, 482
Coburn <i>v.</i> Watson	456	Cook <i>v.</i> Bryant	13
Cockburn <i>v.</i> Lumber Co.	477	<i>v.</i> Carthell	292, 435
Cocke <i>v.</i> Chaney	515	<i>v.</i> Chicago, etc. Co.	353
<i>v.</i> Cross	464, 471	<i>v.</i> Hopper	440
<i>v.</i> McGinnis	352	<i>v.</i> Loomis	456, 460, 528
Coe <i>v.</i> Mager	421	<i>v.</i> Patterson	312, 325, 437, 452
Coffin <i>v.</i> Anderson	12, 45, 275, 312, 316, 320, 389, 393	Coolridge <i>v.</i> Guthrie	388
Coffman <i>v.</i> Buckhalter	526	Coombs <i>v.</i> Collins	247
Cogburn <i>v.</i> Spence	194	Cooper <i>v.</i> Blair	349, 383
Coggle <i>v.</i> Hartford Co.	182	<i>v.</i> Chitty	331
Cohen <i>v.</i> Koster	231	<i>v.</i> Cooper	350, 408, 411
<i>v.</i> N. Y.	133, 135	<i>v.</i> Davis	8
Cohenfield <i>v.</i> Walsh	364	<i>v.</i> Newman	472
Coit <i>v.</i> Humbert	177	<i>v.</i> Newton	253
Colbert <i>v.</i> Daniel	336	<i>v.</i> Ray	288
Colby <i>v.</i> Cressy	318	<i>v.</i> Ry. Co.	128
<i>v.</i> Kimball Co.	211, 516	<i>v.</i> Smith	427
<i>v.</i> Reed	530	Copp <i>v.</i> Williams	291
Colecord <i>v.</i> McDonald	467, 516	Corbitt <i>v.</i> Reynolds	308
Cole <i>v.</i> Berry	182	Cordill <i>v.</i> Minn. Elv. Co.	367
<i>v.</i> Terry	283	Cormier <i>v.</i> Batty	437
Colebrook <i>v.</i> Merrill	362	Corn Ex. Bank <i>v.</i> Peabody	489
Coles <i>v.</i> Clark	49, 99, 100	Cornwall <i>v.</i> Haight	295
<i>v.</i> Soulsby	397	Corona Coal Co. <i>v.</i> Bryan <i>et al.</i> .	379
Coleman <i>v.</i> Pearce	153	Cortelyou <i>v.</i> Hiatt	356
Collier <i>v.</i> Faulk	292, 435	<i>v.</i> Lansing	486
		Cotton <i>v.</i> Marsh	347
		<i>v.</i> Sharpstein	13

TABLE OF CASES CITED

Cotton v. Watkins	102, 435
Coulson v. Panhandle Bank	366
Courtes v. Cane	30, 31, 187, 245, 258
Couse v. Fregent	175
Covell v. Hill	64, 215
Cowdy v. Vanderburgh	181
Cow Run Tank Co. v. Leher	400
Cox v. England	503
v. First Nat'l Bank	127
v. Patten	325
v. Reynolds	257
Craig v. Miller	316
Crain v. Bailey	513
v. Paine	319
Cramer v. Blood	313
v. Marsh	464, 514
Crane Co. v. Bellows	239
Crane v. Murray	424
Crawford v. Thompson	194
Creel v. Kirkman	418, 419
Crenshaw v. Moore	381
v. Smith	535
Crerar v. Daniels	534
Cressy v. Parks	529
Criddle v. Criddle	449
Crippin v. Morison	20, 310
Crocker v. Gullifer	27, 33, 225, 286
Crocket v. Beaty	230
Croker v. Hopps	361
Crosby v. Clark	12
v. Fitch	78
Cross v. Moffatt	402
Crouse v. Walrath	337
Crow v. Boyd	414, 419
Crumb v. Oakes	505
Crump v. Mitchell	64, 225, 349
Crymble v. Mulvaney	475, 525
Crystal Ice Co. v. Gas Co.	191
Cullen v. Lord	28
v. O'Hara	311, 468
Cullom v. Guillot	179
Culver v. Streater	138, 139
Cumberland Tel. Co. v. Taylor	265
Cummins v. People's Assoc.	126
v. Wood	75
Cunningham v. Engar	474
Curry v. Cather	526
v. Wilson	341
Curtis v. Groat	494, 536
v. Hoyt	18
v. Ward	530
Cushing v. Breed	200
v. Longfellow	495
v. Seymour	104, 512, 515, 523
v. Thayer	108, 109
v. Wells	518
Cushman v. Hays	59
Cutler v. Jas. Goold Co.	460, 505
Cutlett v. Stokes	238
Cutter v. Fanning	248
Cuykendall v. Eaton	3, 69, 225

C. W. Zimmerman Mfg. Co. v. Dunn	442
----------------------------------	-----

D

Daggett v. Davis	6, 16, 121, 518
v. Gray	356, 371, 376
Dahill v. Booker	471, 529
Dahms v. Sears	347, 349
Daily's Admr. v. Daily	76
Dain v. Cowing	163, 172, 178
Dale v. Jones	21
Dalton v. Landahn	505
Dame v. Dame	215, 310
Dana v. N. Y. Cent.	520
Danah v. Baird	19
Dane v. Gilmore	369
Daniel v. Daniel	419
Daniels v. Ball	327
Danielson v. Roberts	11, 303
Danley v. Rector	433
Daugherty v. Lady	481
Davis v. Barnes	21
v. Bliss	516
v. Buchanan	449
v. Buffman	310
v. Buffom	20
v. Davis	402
v. Easley	323
v. Funk	14, 36, 59
v. Granite Co.	478
v. Hinson	427
v. Hoppock	389
v. Hubbard	102
v. Krum	199
v. Miller	298
v. Robertson	372
v. Taylor	20, 215, 272, 310, 349, 361
v. Thompson	234
Davison v. Manlove	234
v. Rolf	460, 476
v. Waldron	315, 320, 339, 433
v. Walla Walla	147
Dawson v. Kultner	147
v. Powell	207
v. Sparks	210
Day v. Holmes	37
v. Whitney	293
Deaderick v. Oulds	302
Deal v. Osborne	513
Dean v. Nichols Co.	350
v. Turner	29
v. Vaccaro	520
Dearbourn v. Bank	76, 233, 454
Debon v. Colfax	434
Decan v. Shipper	87
Deck v. Field	518
Decker v. Mathews	14, 369
Deckle v. Calhoun	294, 316
DeClark v. Bell	275
Dee v. Highland	351

TABLE OF CASES CITED

Deens v. Dunklin.....	472	Donner v. Rowell.....	6
Deering v. Austin.....	316, 343	Donohue v. Henry.....	12
De La Guera v. Newhall.....	414	v. Shippee.....	3, 21
Delaney v. Root.....	158, 164, 167	Doodson v. Cooper.....	507
Delano v. Blanchard.....	460	Dooley v. Gladiator Co.....	516
v. Curtis.....	215, 265	Doolittle v. Shaw.....	28, 66, 71
De La Verne v. Richardson.....	366	Doon v. Ravey.....	418
Delfindorff v. Hopkins.....	535	Doty v. Bank.....	118
Delhuntey v. Hake.....	534	v. Hawkins.....	75, 274
Delton v. Hull.....	419	Douglas v. Carpenter.....	56
Delvin v. Houghton.....	192	v. Dickson.....	323
Demott v. Hogehmann.....	323	v. McAllister.....	490
Demund v. French.....	440	v. Mitchell.....	301
Dench v. Walker.....	97, 220	v. Peoples Bank.....	32, 87
Dennis v. Harris.....	302	Dow v. King.....	358
v. Struck.....	334	v. Sanbo.....	296
Dennison v. Chapman.....	333	Dowd v. Wadsworth.....	75, 278
v. Hyde.....	526	Down v. Finnegan.....	409, 423
Dent v. Chiles.....	267, 278, 441	Downey v. Arnold.....	449
Denver, etc. Ry. Co. v. Frame.....	493, 518	Downing v. Outerbridge.....	5, 524, 527, 533
Depuy v. Clark.....	515	Dows v. Bank.....	459, 481
Derby v. Gallup.....	437, 438	v. Bignal.....	362
Dethoff v. Gattie.....	195	v. Greene.....	184
Devin v. Walsh.....	381	v. Milwaukee Bank.....	85
Devoyn v. Covey.....	225	v. Moorewood.....	227
v. Mich. Lbr. Co.....	27, 64	v. Rush.....	184
Dexter v. Dexter.....	531	Doyle v. Burns.....	450, 478, 517, 532
Dezell v. Odell.....	301, 326	Dozier v. Pillot.....	217
Diamond v. McDowdell.....	325	Drake v. Auerbach.....	30
Dickey v. Franklin Bank.....	213	v. Cloonan.....	37
Dickson v. Merchants Co.....	313, 344	v. Redding.....	328
Dietus v. Fuss.....	275, 378	Draper v. Buxton.....	195
Diffle v. Morris.....	527	v. Walker.....	8, 319
Diller v. Brubaker.....	35, 59, 60	Drennen v. Charles.....	523
Dimock v. U. S. Bank.....	34, 490	Drew v. Spaulding.....	26, 310, 391, 395
District v. French.....	533	Drexell v. Ramond.....	264
Dishbrow v. Senbroeck.....	64	Drought v. Curtis.....	451
Ditch v. Bank.....	14	Drudge v. Leiter.....	200
Dittemore v. Cable Mill Co.....	412	Drumm Photo Co. v. Edmisson.....	506
Dixie v. Harrison.....	261	Dubois v. Harcourt.....	300
v. Randall.....	212	Dudley v. Abner.....	525
Dixon v. Caldwell.....	211, 253, 460	v. Sawyer.....	246
v. White Co.....	195	Duff v. Bailey.....	218
D. M. Osborne Co. v. Plano Co.....	347	Duffield v. Miller.....	224
Dockstader v. Y. M. C. A.....	226	Duffins v. Bangs.....	534
Dodd v. Hammock.....	339	Dufour v. Mephram.....	69
Dodds v. Greyson.....	405	Duggan v. Wright.....	266, 357
Dodge v. Chandler.....	53	Dunbar v. Boston Co.....	90, 520
v. Goodell.....	531	v. Rawles.....	183
v. Meyer.....	213	Duncan v. Fisher.....	456
v. Perkins.....	264	v. Ry. Co.....	66, 290
Doherty v. Madgett.....	73, 224	v. Spear.....	326, 452, 454
Dole v. Olmstead.....	200	Duncans v. Stone.....	181, 211
Doliff v. Robbins.....	460, 481	Dunham v. Converse.....	256, 533
Doll v. Hennessy.....	465, 532	v. Cox.....	226, 361
Donaldson v. Farwell.....	179	v. Parmenter.....	341
Donham v. Cox.....	13	Dunkin v. McKee.....	300
Donlin v. McQuade.....	215, 228	v. Wilkins.....	313
Donnell v. Jones.....	526	Dunks v. Fuller.....	429
v. Thompson.....	226, 293, 441	Dunlap v. Hunting.....	272
v. Wyckoff.....	37, 62	Dunn v. Branner.....	75

TABLE OF CASES CITED

Dunn v. O'Neal.....	206
Dunnahue v. Williams.....	240
Dunning v. Choate.....	404
v. Fitch.....	292, 435
v. Northrup.....	209
Durant v. Einstein.....	62
v. Rogers.....	152
Durfee v. Jones.....	303
Durgin v. Gage.....	216
Durham v. Bank.....	507
Durkee v. Kenosha.....	141
Durr v. Jackson.....	525
Durrell v. Mosher.....	244
Dusky v. Rudder.....	70, 75, 220
Dwight v. Brewster.....	73
v. Simon.....	152
Dyckman v. Valiente.....	159, 178
Dyer v. Rosenthal.....	438, 476
Dykers v. Allen.....	36, 57
Dyson v. Ream.....	388

E

Eagle Bank v. Smith.....	416
Earle v. Grant.....	36
v. Van Buren.....	246
Easley Ex. v. Easley.....	261
Easley Lbr. Co. v. Lewis.....	246
East v. Pace.....	529
Easter v. Fleming.....	320
Eastern, etc. Ry. v. Easton.....	144
Eastman v. Harris.....	206
v. Meredith.....	131
Easton v. Hodges.....	57
Eaton v. Hill.....	28, 188
Edgerly v. Emerson.....	363, 364
v. Whalon.....	46
Edmunds v. Hill.....	246
v. Merchants Co.....	90
Edmondson v. Brie.....	270
Edwards v. Dickinson.....	522
v. Dooley.....	282, 319
v. Express Co.....	3
v. Sonoma Bank.....	367, 368
v. Welton.....	319
v. White Co.....	70, 95, 96
Eiseman v. Maul.....	453
Elec. Co. v. Met. Tel. Co.....	234
Eldridge v. Hofer.....	530
Elgin v. Josylin.....	424
Elkstram v. Hall.....	320
Elliot v. Hayden.....	347, 536
v. Jackson.....	412
Ellis v. Wire.....	495
Elmore v. Simon.....	292
Elred v. Oconto Co.....	259
Elva v. American Ex. Co.....	89
Elwell v. Martin.....	427
Emerson v. McNamara.....	407
v. Thompson.....	389
Emporia Bank v. Layfeth.....	368, 383
Enos v. Bemis.....	356, 367, 373

Ensley Land Co. v. Lewis.....	347
Ensworth v. Barton.....	456
Equitable Co-op. Co. v. Hersee.....	408
Erie Co. v. Dial.....	204
Erie Dispatch v. Johnson.....	89
Erskine v. Honbach.....	193
Esmay v. Fanning.....	69
Ess v. Griffith.....	346
Ester v. Booth.....	228
Etter v. Bailey.....	51, 264, 284
Eureka, etc. Works v. Bresna- ham.....	387, 395
Evans v. Mason.....	6
v. Miller.....	324, 425
Evarts v. Burgess.....	52
Everett v. Coffin.....	45, 444
Evington v. Smith.....	294
Ewing v. Blount.....	460, 527
Exeter Bank v. Gordon.....	515

F

Fairbanks v. Kent.....	242, 250
v. Phillips.....	237, 436
Falke v. Terry.....	336
Fanson v. Linsey.....	408, 411
Farkes v. Powell.....	64, 65
Farley v. Lincoln.....	185
Farmer et al. v. Bank.....	292
Farmers & M. Bank v. Bank.....	340
Farmers Bank v. McKee.....	321, 523
Farnsworth v. Lowrey.....	4
Farr v. Smith.....	171
Farrand v. Hurlburt.....	11, 51,
245, 264, 285	
Farrar v. Chauffetete.....	215
v. Paine.....	471
v. Talty.....	528
Farrelly v. Hubbard.....	12
v. Ladd.....	76
Farrer v. Rollins.....	454
Farrington v. Payne.....	241
Farrow v. Wooley.....	319, 450
Farwell v. Meyers.....	382
v. Price.....	478
F. A. Thomas Mach. Co. v. Voel- ker.....	450
Faulkner v. Santa Barbara Bank.....	288, 333
Faust v. So. Car. Co.....	97
Fawcett v. Osborn.....	3, 30, 184, 192
Fay v. Davidson.....	448
v. Gray.....	16, 33, 37, 286
Fee v. Fee.....	352
Feist v. Prince.....	316
Felchin v. McMillan.....	275
Fellows v. Wadsworth.....	300
Felt v. Heye.....	39
Felton v. Fuller.....	509
Fenelson v. Rackliff.....	386, 393
Fennesey v. Spofford.....	447
Ferge v. Burt.....	514

TABLE OF CASES CITED

Ferguson v. Buchell.....	530	Focke v. Blum.....	465
v. Clifford.....	272	Fogan v. Vogt.....	310
Fernald v. Chase.....	217	Foggan v. Lake Shore Co.....	86
Ferrier v. Manning.....	535	Folsom v. Manchester.....	274
v. Wood.....	381	Foltz v. Stevens.....	290
Ferrill v. Brewis.....	77	Foo Long v. Chi Fong.....	533
Ferry v. McCormick Co.....	191	Foot v. Murrell.....	24
Fewald v. Chase.....	213	Forbes v. Boston Co.....	86
Field v. Munster.....	509, 520	v. Jason.....	15
Fields v. Brice.....	8, 388	Ford v. Ransom.....	103
v. Des Moines.....	146	v. Roberts.....	234, 505
v. Pierce.....	119	v. Williams.....	508
v. Stockley.....	144	Fordyce v. Dempsey.....	460
v. Williams.....	530	Forehand v. Jones.....	231
Fifth National Bank v. Ware- house.....	472	Forke v. Homann.....	470
Fike v. Art.....	357	Fornes v. Wright.....	153
Filter v. Fossard.....	196	Forsyth v. Price.....	22
Final v. Backus.....	476, 496	v. Wells.....	3, 25, 499
Finch v. Clark.....	238, 270	Fort v. Saunders.....	467
v. Kent.....	433	v. Wells.....	187
Finley v. Bryson.....	412	Forth v. Pursley.....	217, 242, 264, 322, 533
Fiquet v. Allison.....	169, 172, 263, 421, 423	Fort S. & W. Ry. v. Ford.....	528
First Mass. Assoc. v. Field.....	353	Fosdick v. Greene.....	484, 517
First Nat'l Bank v. Bank.....	490	Foshay v. Ferguson.....	241
v. Boyce.....	513	Foster v. Brooks.....	460
v. Cleland.....	29	Foster Lbr. Co. v. Kelly.....	405
v. Dunbar.....	12	Foster Woolen Co. v. Wallman	275, 291
v. Elev. Co.....	238	Fouldes v. Willoughby.....	4
v. Gaddis.....	370	Fowle v. Ward.....	16
v. Lyman.....	529	Fowler v. Bowery Sav. Bank...	423
v. Mings.....	39	v. Gilman.....	472
v. Northern Co.....	86	Fowler Co. v. McDonnell.....	449
v. N. Y. etc. Co.....	86	Fox v. Jones.....	509, 527
v. Rush.....	36, 39, 60	v. N. O. Liberties.....	536
v. Scott.....	203	v. Prichett.....	536
First Parish v. Jones.....	19	Foy v. Chi. etc. Co.....	519
Fish v. Ferris.....	188	Frame v. Dennis.....	5, 278
Fisher v. Brown.....	22, 482, 522	v. Ore. L. Co.....	440
v. Kyle.....	27, 65	France v. Orvis.....	382
v. Meek.....	404	Frank v. Atlanta.....	147
Fishkill Savings Inst. v. Nat'l Bank.....	123	v. Tatum.....	444
Fisk v. Meek.....	212, 291	Franklin Bank v. Harris.....	16
Fitch v. Beach.....	209	Franklin C. Co. v. McMillan	23, 498
v. Newberry.....	93	Franklin v. Waters.....	352
Fitzgerald v. Blocher.....	38, 514	Franks v. Holly Grove.....	137
v. Burrell.....	314	Frantz v. Winehill.....	284, 307
Fitzhugh v. Bank.....	118	Frat. Army of America v. Evans	29
v. Wiman.....	313	Frat. v. Clark.....	414
Flanders v. Colby.....	3, 229, 254	Freedman v. Campfield.....	439
Flannery v. Harley.....	48	Freehill v. Hueni.....	238, 247
Fleckenstein v. Inman.....	403	Freeman v. Boland.....	67, 188
Fleischmann v. Samuel.....	476	v. Elter.....	533
Fletcher v. Clugram.....	152	v. Harwood.....	122
v. Fletcher.....	74, 276	v. Pickham.....	415
Florence et al v. Helmo et al...	371	v. Underwood.....	181, 209, 211
Flowers v. Sproule.....	287	French v. Freeman.....	29
Floyd v. Brown.....	536	Frick v. Davis.....	536
v. Gibbs.....	9	v. U. S. Ins. Co.....	475
Flynt v. Chicago Co.....	464	Frink v. Pratt.....	294, 308

TABLE OF CASES CITED

Frisbie <i>v.</i> Langworthy.....	102
Friswig <i>v.</i> Orr.....	239
Frost <i>v.</i> Plumb.....	27, 66, 67, 71
Frothingham <i>v.</i> Morse.....	482
Fry <i>v.</i> Baxter.....	364, 365
<i>v.</i> Soper.....	403
Fryatt <i>v.</i> Sullivan.....	63
Fullam <i>v.</i> Cummings.....	29, 534
Fuller <i>v.</i> Duren.....	416, 417, 420
<i>v.</i> Fuller.....	345, 346
<i>v.</i> Tabor.....	2
Fulton <i>v.</i> Fulton.....	8
Funk <i>v.</i> Funk.....	382
<i>v.</i> Hendricks.....	490
Furman <i>v.</i> Union Pac. Co.....	85

G

Gaetner <i>v.</i> West. E. Co.....	213
Gaffield <i>v.</i> Hapgood.....	309
Gafford <i>v.</i> Stearns.....	294
Gage <i>v.</i> Epperson.....	193
<i>v.</i> Whittier.....	46, 223
Gaines <i>v.</i> Briggs.....	452
Gale <i>v.</i> Gale.....	438
<i>v.</i> McDaniel.....	352
<i>v.</i> Salas.....	449
Galigher <i>v.</i> Jones.....	38, 490
Gallagher <i>v.</i> Lond. Assur. Co....	449
Galler <i>v.</i> McMahon.....	534
Galveston etc. Ry. Co. <i>v.</i> Efron..	519
Galvin <i>v.</i> Bacon.....	240, 254
<i>v.</i> Mac. Min. Co.....	425
Gam <i>v.</i> Cordrey.....	434
Gandy <i>v.</i> Cowart.....	391
Ganong <i>v.</i> Green.....	101, 511
Garbutt Lbr. Co. <i>v.</i> Prescott....	269
Garden Bank <i>v.</i> Hunneston Co..	86
Gardner <i>v.</i> Baer.....	535
Garibold <i>v.</i> Wright.....	334
Garrard <i>v.</i> Dawson.....	481
Garvin <i>v.</i> Luttrell.....	275
Gary <i>v.</i> Abington.....	380
Gaskill <i>v.</i> Barbour.....	316, 378
Gaskins <i>v.</i> Davis.....	22
Gates <i>v.</i> Gates.....	239, 297
<i>v.</i> Rifle Boom Co.	199, 200, 503
<i>v.</i> Thede.....	456
Gauche <i>v.</i> Millbrath.....	452, 535
Gavin <i>v.</i> Wiswell.....	305
Gaw <i>v.</i> Bingham.....	239, 268
Gay <i>v.</i> Moss.....	33, 35, 59, 287
Gaywood <i>v.</i> Van Ness.....	17
Geekie <i>v.</i> Car Co.....	346
Genet <i>v.</i> Howland.....	35, 61
Geneva Wagon Co. <i>v.</i> Smith....	257
Gensburg <i>v.</i> Field.....	476,
	490, 493, 527
Gentry <i>v.</i> Kelley.....	476
<i>v.</i> Maden.....	68, 216, 241
Geo. R. Dickinson Co. <i>v.</i> Mail	
Pub. Co.	394

George <i>v.</i> Pierce.....	403, 454
<i>v.</i> Stubbs.....	181
Georgia Ry. Co. <i>v.</i> Cole.....	521
<i>v.</i> Crawley.....	365
Gerald <i>v.</i> Jones.....	378, 393, 404
Gerhardt <i>v.</i> Swaty.....	151
Gerrish <i>v.</i> Cummings.....	535
Geyser-Marion Co. <i>v.</i> Stark....	128
Gibbons <i>v.</i> Farwell.....	4, 70,
	95, 222, 443
Gibbs <i>v.</i> Chase.....	300, 530
<i>v.</i> Jones.....	241, 256, 398
Gifford <i>v.</i> Meyers, etc. Co.....	308
Gilbert <i>v.</i> Dickenson.....	178
<i>v.</i> Peck.....	529, 530
<i>v.</i> Priest.....	339
<i>v.</i> Walker.....	214, 457
Giles <i>v.</i> Merritt.....	245
Gillespie <i>v.</i> Chastain.....	328
<i>v.</i> Evans.....	15
Gillett <i>v.</i> Roberts.....	230, 259
<i>v.</i> Whiting.....	35
Gilman <i>v.</i> Hill.....	211, 250
Gilmer <i>v.</i> Morris.....	61
Gilmore <i>v.</i> McNeil.....	298
<i>v.</i> Newton.....	175, 211, 252, 257
Gilpin <i>v.</i> Holwell.....	16
Gilson <i>v.</i> Fisk.....	3
<i>v.</i> Gwinn.....	94
<i>v.</i> Wood.....	325
Girard Co. <i>v.</i> Marr.....	57
Gittings <i>v.</i> Winter.....	510
Given <i>v.</i> Kelley.....	156
Gladsey <i>v.</i> Prewitt.....	341
Glascocock <i>v.</i> Hays.....	469
Gaspy <i>v.</i> Cabot.....	24
<i>v.</i> Paine.....	477
Glass <i>v.</i> Basin Co.....	214, 359
<i>v.</i> Garber.....	525
Glaze <i>v.</i> McMillion.....	439
Gleason <i>v.</i> Morrison.....	364
<i>v.</i> Owen.....	17, 29
Glencoe Land Co. <i>v.</i> Hudson	
Bros. Co.	18, 25, 361, 372
Glenn <i>v.</i> Garrison.....	353, 378, 442
Glidden <i>v.</i> Mich. Mill Bank....	400
Gock <i>v.</i> Kennedy.....	345
Goddard <i>v.</i> Mallory.....	79
<i>v.</i> Winchell.....	25, 305
Godwin <i>v.</i> Talrizer.....	504
Goebel <i>v.</i> Hough.....	526
Goell <i>v.</i> Morse.....	163
<i>v.</i> Smith.....	2
Goff <i>v.</i> Brainerd.....	203
Goldberg <i>v.</i> Shapiro.....	537
Goldberger <i>v.</i> Liebowitz.....	399
Goldsmidt <i>v.</i> M. E. Church.....	35, 177
Goldstein <i>v.</i> Suchtrotz.....	234
Goller <i>v.</i> Fett.....	24, 498, 499
Goltra <i>v.</i> Penland.....	370, 442, 460
Goodbar <i>v.</i> Lindsley.....	524
Goodell <i>v.</i> Fairbrother.....	183

TABLE OF CASES CITED

Goodman v. Northeutt.	200
Goodwin v. Garr.	316
v. Mass. etc. Co.	308
v. Sommer.	533
v. Stephens.	195
v. U. S.	473
v. Wertheimer.	239
Goodwyne v. Goodwyne	443
Goodyear v. Williston.	196
Gooth v. Isbell.	456
Gordon v. Bruner.	425
v. U. S.	335
Goss v. Emerson.	37, 57
Gottlieb v. Drummond.	272
v. Hartman.	247
Gould v. Brown.	364
Gove v. Watson.	28, 460, 530
Grabfelder v. Lockett.	288
Grace v. McKissack.	68
v. Miller.	194
Grady v. Sharron.	448
Gragg v. Hill.	265
Graham v. Hamilton.	448
v. Harrower.	396
v. Purcell.	25
v. Smith.	27
v. Warner.	373, 389
Grant v. King.	245, 260, 348
v. Miller.	249
v. Smith.	445, 496
Gratton Co. v. Redelsheimer	13
v. Wiggins.	402
Gravell v. Clough.	484
Graves v. Dudley.	11
v. Smith.	69, 290
v. Walter.	309
Gray v. Cocheron.	459
v. Eschen.	532
v. Gilliam.	268
v. Parker.	498
Grayson v. Glover.	449
Great So. Co. v. Logan Co.	511
Great Western Co. v. News Assoc.	225
Green v. Bennett.	212
v. Biddle.	328
v. Boston Co.	493, 519
v. Burr.	316
v. Edick.	160
v. Palmer.	371
v. Stevens.	481, 530
v. Williams.	525
Greenbaum v. Taylor.	20, 363, 385
Greenfield Bank v. Leavitt.	505
Greenleaf v. Ludington.	112, 123
Greensburg v. Field.	373
Greenthal v. Lincoln.	529
Greer v. Lafayette Bank.	35, 59
v. Newland.	408
Gregg v. Bank.	211
v. Columbia Bank.	287
v. Hatcher.	137

Gregg v. Wyman	71
Gregory v. Montgomery	351
v. Rosekrans	447
Gregory Point Ry. Co. v. Sel-	
leek	434
Greiner v. Hild	320, 448
Grier v. Ward	526
Griffeth v. Ry. Co.	389
Griggs v. Day	33, 226, 484, 515
Grim v. Wicker	165
Grimes v. Barndollar	490
v. Briggs	312
v. Cannall	202
v. Dry Goods Co.	449
Grinnell v. Anderson	419
Griswold v. Haven	152, 460, 462
v. Morse	104
Gritner v. Pac. S. W. Co.	467
Groat v. Gillespie	526
Gross v. Scheel	247
Grove v. Wise	164, 172
Groveland Imp. Co. v. Far-	
mers S. Co.	448
Grubb v. Guilford	25, 311
Gruman v. Smith	62, 468, 489, 517
Grund v. Van Cleck	155
Grunert v. Brown	350
Guernsey v. Fulmer	437
Guest v. Neinly	371
Guilford v. McKinley	516
Gunn v. Burghart	474
Gunter v. James	204
Gurley v. Armstead	97, 222, 444
v. Wood	152
Gurney v. Kenny	259
Guthrie v. Jones	19, 309

H

Haas <i>v.</i> Attieri	13
<i>v.</i> Damong	51
<i>v.</i> Dawson	263
<i>v.</i> Sackett	536
<i>v.</i> Taylor	240
Haddix <i>v.</i> Einstman	210
Haegle <i>v.</i> Western Stove Co.	118
Hagar <i>v.</i> Randall	270
Hage <i>v.</i> Campbell	392, 403
Hahn <i>v.</i> Sleepy Eye Mill Co.	248, 294
Haines <i>v.</i> Beach	381
Hake <i>v.</i> Buell	256
Halbert <i>v.</i> Rosenbalm	14
Halbran <i>v.</i> Gray	403
Hale <i>v.</i> Ames	2, 196
Hall <i>v.</i> Amos	8, 216
<i>v.</i> Blake	530
<i>v.</i> Boston Ry.	69, 88
<i>v.</i> Brown	446
<i>v.</i> Corcoran	27, 28, 60, 71, 188, 530
<i>v.</i> Dickey	351

TABLE OF CASES CITED

Hall v. Hinks.....	179	Harris v. Del. etc. Co.....	524
v. Naylor.....	212, 296	v. Goslin.....	381
v. Nix.....	516	v. Grant.....	469, 511
v. Peckham.....	418	v. Newman.....	324
v. Pillsbury.....	200	v. Staples.....	210
v. Robinson.....	268	v. Tenny.....	347
v. Susskind.....	363, 447	v. Thomas.....	35
v. Younts.....	527	v. Trowbridge.....	489
Halleck Lbr. Co. v. Gray....	15, 57	Harris L. Co. v. Book T. Writer	
v. Mixer.....	414	Co.....	446
Hallehan v. Roughan.....	15	Hart v. Brierly.....	478
Hallett v. Novion.....	477	v. Hart.....	388
Halsey v. Bird.....	285	v. Skinner.....	532
Hamaker v. Blanchard.....	303	v. Spaulding.....	519
Hamer v. Hathaway.....	464	v. Ten Eyck.....	510
Hamet v. Letcher.....	185	Hartford v. Cambria.....	25
Hamilton v. Fond Du Lac....	140	Hartford Ice Co. v. Cambria Co.	311
v. Granger Co.....	470	v. Greenwood Co.....	213, 278
v. Law.....	472	Hartshorn v. Williams.....	320
v. State Bank.....	38, 59	Harvey v. Epes.....	318
Hamlin v. Carruthers.....	234, 344, 382	v. Lidvall.....	437
Hammer v. Wilsey.....	291	v. McAdams.....	102, 151, 358
Hammond v. Darlington.....	493	v. Morse.....	464, 465
v. Decker.....	474	Haskins v. Warren.....	295
Hampton v. Swisher.....	451	Haslam v. Lockwood.....	312
Hanaway v. Wiseman.....	532	Hassam v. Hassam.....	411
Hance v. Boom Co.....	199	Hastay v. Bonness.....	22, 504
v. McCormick.....	447	Hatch v. Kenney.....	300
Hancock v. Ins. Co.....	60	Hatcher v. Philham.....	460
Hand v. Baynes.....	78	Hathaway v. Bank.....	472
v. Scodoletti.....	247, 249, 460	v. Everett.....	137
Hanin v. Drew.....	391, 393	Haven v. Emery.....	18
Hanna v. Phelps.....	227	Haverly v. Elliott.....	464, 526
Hannon v. Bramley.....	340, 365	Hawes v. Gas Co.....	17
v. W. Land Co.....	347	Hawkins v. Hersey.....	516
Hanson v. Byrnes.....	399	v. Hoffman.....	233, 381
Hardin v. Palmerlee.....	382	v. Mellis Co.....	490
Hardwick v. Cox.....	387	v. Pearce.....	357
Hardy v. Keeler.....	224, 241	v. Spokane.....	201
v. Monroe.....	313, 321	Hawkins Lbr. Co. v. Bray.....	433
Hare v. Atl. City Brew. Co....	398	Hawks v. Charlemont.....	134, 135
v. Pearson.....	217, 230	Haws v. Morgan.....	341
Harger v. Edwards.....	470	Hayden v. Davis.....	84
Hark v. Linderman.....	181	Haydon v. Nicoletti.....	293
Harker v. Dement.....	3, 256, 444, 454, 468	Hayes v. Mass. etc. Ins. Co....	241, 381, 522
Harkness v. Russell.....	181, 182	v. Wells Fargo Co.....	89
Harlan v. Brown.....	365	Haynes v. Hobbs.....	316
v. Harlan.....	24, 324	v. Hettenbach.....	6, 391
Harmon v. Connett.....	460	Hays v. Farwell.....	346
Harne v. Briggs.....	103	Haywood v. Leeson.....	481
Harney v. Epes.....	66, 289	v. Rogers.....	37
Harp v. Harp.....	449	Hazard v. Bank.....	118
Harpending v. Meyer.....	68, 181, 349	Hazelton v. Locke.....	13, 360
Harper v. Scott.....	456	Hazenwell v. Coursen.....	17
Harpes v. Harpes.....	328	Hazzard v. Duke.....	293, 515
Harrington v. Edwards.....	219	H. C. Jaquith Co. v. Shurmway	450
v. King.....	326	Head v. Becklenberg.....	460
v. Snyder.....	64	v. Goodwin.....	349, 369
v. Stromberg.....	358, 364	Heard v. James.....	496, 503, 527
Harris v. Brain.....	344	Hearty v. Klinkhammer.....	346
v. Cable.....	14	Heath v. Griswold.....	37

TABLE OF CASES CITED

Heath <i>v.</i> Lent.....	525	Hillsborne <i>v.</i> Brown.....	19
<i>v.</i> Ross.....	323	Hilton <i>v.</i> Burley.....	364
Heckle <i>v.</i> Kervey.....	186, 256, 349	<i>v.</i> Ry. Co.....	460
Heddy <i>v.</i> Fullen.....	361	Himmelman <i>v.</i> Des Moines Ins.	
Hedenburg <i>v.</i> Hedenburg.....	336	Co.....	29, 214
Hedrick <i>v.</i> Young.....	23	Hineckley <i>v.</i> Baxter.....	19, 272
Heffin <i>v.</i> Slay.....	101	<i>v.</i> Lewis.....	13
Heinekamp <i>v.</i> Beaty.....	481	Hine <i>v.</i> Comm. Bank.....	122
Heineman <i>v.</i> Steigle.....	192	Hines <i>v.</i> McKinney.....	244
Heisrodt <i>v.</i> Hackett.....	27	Hinkley <i>v.</i> Pfeister.....	34
Helm <i>v.</i> Swiggett.....	118	Hinman <i>v.</i> Heyderstadt.....	462
Hemlitt <i>v.</i> Owens.....	345	Hinson <i>v.</i> Smith.....	523
Hendricks <i>v.</i> Decker.....	460	Hipple <i>v.</i> Puie.....	310
<i>v.</i> Evans.....	481	Hite <i>v.</i> Long.....	382
Hendrickson <i>v.</i> Dwyer.....	529	Hitson <i>v.</i> Hurb.....	534
Hennequin <i>v.</i> Clews.....	13	Hoagland <i>v.</i> Forest Park Co....	302
Henney Buggy Co. <i>v.</i> Higham.....	275	Hoard <i>v.</i> Old Dom. Co.....	89
Henry <i>v.</i> Allen.....	381	Hobart <i>v.</i> Beers.....	450
<i>v.</i> Manistique Iron Co.....	433	Hobbs <i>v.</i> Chicago Packing Co....	150
<i>v.</i> Sowles.....	362	Hodge <i>v.</i> Railway Co.....	316
Henshaw <i>v.</i> Banks.....	482	Hodson <i>v.</i> Goodale.....	22, 477
Hepburn <i>v.</i> Sewell.....	536	Hoffman <i>v.</i> Carow.....	31, 175
Herbert <i>v.</i> Lege.....	323	<i>v.</i> Harrington.....	533
Herdic <i>v.</i> Young.....	498	<i>v.</i> Noble.....	185
Hereford <i>v.</i> Pusch.....	377, 456	Hogan <i>v.</i> Elev. Co.....	481
Herman <i>v.</i> No. Pac. Ry.....	320	<i>v.</i> Norton.....	192
Herrick <i>v.</i> Hdw. Co.....	17	Hoge <i>v.</i> Norton.....	526
<i>v.</i> Humphrey.....	122	Hoke <i>v.</i> Buell.....	181
Herring <i>v.</i> Tilghman.....	294, 315	Holaman <i>v.</i> Marsh.....	470
Herrick <i>v.</i> McDonald.....	365	Holbrook <i>v.</i> Wight.....	73, 84, 150, 280
Herron <i>v.</i> Hughes.....	291, 444	Holden <i>v.</i> Gilfeather.....	212
Hershburg <i>v.</i> Barbourville.....	137	Holderman <i>v.</i> Berry.....	470
Hesseltine <i>v.</i> Stockwell.....	198, 203	<i>v.</i> Pond.....	334
Hetrick <i>v.</i> Smith.....	490	Holdridge <i>v.</i> Lee.....	377
Hett <i>v.</i> Boston Ry. Co.....	275	Holland <i>v.</i> Bishop.....	13, 192
Hews <i>v.</i> Wall.....	535	<i>v.</i> Osgood.....	234
Heyland <i>v.</i> Badger.....	103	<i>v.</i> Peck.....	335
Heylon <i>v.</i> Badger.....	103	Holleday <i>v.</i> Cohen.....	525
Heywood <i>v.</i> Reed.....	449	Hollenback <i>v.</i> Miller.....	224
Hickok <i>v.</i> Buck.....	290, 505	Holloway Seed Co. <i>v.</i> Bank.....	199
<i>v.</i> Burt.....	318	Holman <i>v.</i> Ketchum.....	315
Hickox <i>v.</i> Anderson.....	275	Holmes <i>v.</i> Bailey.....	321, 433
Hicks <i>v.</i> Cleaveland.....	238	<i>v.</i> First Nat'l Bank.....	288
<i>v.</i> Lyle.....	14, 69, 220	<i>v.</i> Langston.....	14
<i>v.</i> Moyer.....	239	<i>v.</i> Sprowl.....	468
Hiddenheimer <i>v.</i> Sides.....	54	Holt <i>v.</i> Burbank.....	297
Higgins <i>v.</i> Emmons.....	271	Holton <i>v.</i> Hubbard.....	285
<i>v.</i> Kusteren.....	20	Homer <i>v.</i> Fish.....	353
<i>v.</i> Lodge.....	49	<i>v.</i> Thwing.....	188
<i>v.</i> Mansfield.....	525	Hon <i>v.</i> Hon.....	246, 261
<i>v.</i> Whitney.....	456	Hone <i>v.</i> Hanson.....	199
Hilgert <i>v.</i> Levin.....	39, 177	Honey <i>v.</i> Bromley.....	258
Hill <i>v.</i> Belasco.....	76, 278	Honk <i>v.</i> Minnick.....	352
<i>v.</i> Campbell Co.....	223, 358	Hood <i>v.</i> Maxwell.....	381
<i>v.</i> Canfield.....	24, 460, 476	Hooker <i>v.</i> Latham.....	17
<i>v.</i> Finnegan.....	38	Hoover <i>v.</i> Blandy.....	225
<i>v.</i> Freeman.....	261	<i>v.</i> Wells.....	311
<i>v.</i> Hayes.....	69, 224, 533	Hopkins <i>v.</i> Dipert.....	389, 433, 481, 535
<i>v.</i> Larro.....	464	<i>v.</i> Shelton.....	398
Hillebrant <i>v.</i> Brewer.....	464	Hopper <i>v.</i> Haines.....	460
Hilliard <i>v.</i> Woods.....	490	<i>v.</i> Hays.....	349
Hills <i>v.</i> Snell.....	4, 6, 176	<i>v.</i> McWhorter.....	284

TABLE OF CASES CITED

Hopper <i>v.</i> Miller.....	319	Hurlburt <i>v.</i> Green.....	508
Horn <i>v.</i> Davis.....	282	Hurley <i>v.</i> Texas.....	140
Horne <i>v.</i> Mandelbaum.....	408	Hurst <i>v.</i> Cook.....	388, 393
Horneffer <i>v.</i> Duress.....	364, 383	<i>v.</i> Cwley.....	464
Horton <i>v.</i> Morgan.....	37	<i>v.</i> Gwennap.....	253
Hosfeldt <i>v.</i> Dill.....	53	<i>v.</i> Mellinger.....	234, 384
Hotchkiss <i>v.</i> Hunt.....	245, 252, 415	Hurt <i>v.</i> Hubbard.....	451
<i>v.</i> McVickar.....	301, 435	Hussam <i>v.</i> Lumber Co.....	476
Houghton <i>v.</i> Puryear.....	344, 505	Hutchings <i>v.</i> Castle.....	368
Houser <i>v.</i> Houser.....	293	Hutchins <i>v.</i> King.....	211, 292
Houston <i>v.</i> Adams.....	89	Hutchinson <i>v.</i> Bank.....	32
<i>v.</i> Dyche.....	182, 258	<i>v.</i> Whitmore.....	369
Houston, etc. Ry. Co. <i>v.</i> Adams	351	Hutton <i>v.</i> Arnett.....	288
Hovey <i>v.</i> Grant.....	492	Hyams <i>v.</i> Barnberger.....	513
Howard <i>v.</i> Barton.....	333	Hyde <i>v.</i> Cookson.....	206, 323
<i>v.</i> Burns.....	349	<i>v.</i> Cooper.....	195
<i>v.</i> Chase.....	346	<i>v.</i> Noble.....	31, 181,
<i>v.</i> Cooper.....	529	240, 254, 327, 536	
<i>v.</i> McDonough.....	447	<i>v.</i> Stone.....	159, 282
<i>v.</i> Seattle Bank.....	17,	Hyde Park Co. <i>v.</i> Shepardson..	316
211, 377		Hynes <i>v.</i> Patterson.....	527
<i>v.</i> Snelling.....	283, 530		
Howe <i>v.</i> Clancey.....	418	I	
Howell <i>v.</i> Kroose.....	268	Iasigi <i>v.</i> Shea.....	361
Howrey <i>v.</i> Hoover.....	512	Iler <i>v.</i> Baker.....	224
Hoxsie <i>v.</i> Emp. Lbr. Co.....	500, 504	Ill. Cent. Ry. Co. <i>v.</i> Brook-	
Hoy <i>v.</i> Smith.....	334, 336	haven.....	80
Hoye <i>v.</i> Pa. Co.....	402	<i>v.</i> Le Blanc.....	25, 460
Hoyt <i>v.</i> Duluth.....	445	<i>v.</i> Ogle.....	499
Hubbard <i>v.</i> Rogers.....	470	<i>v.</i> Parks.....	88, 318
Hubbard Bank <i>v.</i> Cleland.....	456	Imhoff <i>v.</i> Richards.....	444, 474
Hubbell <i>v.</i> Blandy.....	63, 69,	Ind. Ry. Co. <i>v.</i> McKerman....	35
220, 225, 517		Ingalls <i>v.</i> Bulkley.....	75, 274, 277
<i>v.</i> Drexel.....	37	Ingersoll <i>v.</i> Barnes.....	20, 75, 274
Hubert <i>v.</i> Brackett.....	383	Ingle <i>v.</i> Bosworth.....	410
Hudelson <i>v.</i> Tobias Bank.....	358	Inglebright <i>v.</i> Hammond.....	200
Hudson <i>v.</i> Banes Co.....	193	Ingram <i>v.</i> Rankin.....	460, 464, 509, 530
<i>v.</i> Goff.....	271	Inman <i>v.</i> Ball.....	366
<i>v.</i> Goodale.....	477	Ireland <i>v.</i> Horseman.....	455
<i>v.</i> Grocery Co.....	532	Irish <i>v.</i> Cloyes.....	231, 442
Hudspeth <i>v.</i> Wilson.....	18, 29	Irvine <i>v.</i> Wood.....	135
Huelet <i>v.</i> Reyus.....	209, 297	Irving <i>v.</i> Hubbard.....	356, 359
Huellmantel <i>v.</i> Winton.....	512	Irwin <i>v.</i> Brown.....	413
Huffman <i>v.</i> Hughlett.....	426, 427	Isaacs <i>v.</i> Hermann.....	426
Hughes <i>v.</i> Coors.....	191	<i>v.</i> McLean.....	529
Hull <i>v.</i> Southworth.....	341	Isle R. M. Co. <i>v.</i> Hertin.....	24,
Humpfner <i>v.</i> Osborne.....	371, 403	205, 504	
Humphreys <i>v.</i> Mining Co.....	364	Ivers Co. <i>v.</i> Allen.....	211
Hundley <i>v.</i> Calloway.....	466, 469		
Hungerford <i>v.</i> Redford.....	206	J	
Huning <i>v.</i> Chavez.....	530	Jackson <i>v.</i> Chapman.....	259
Hunnicutt <i>v.</i> Higginbotham....	12	<i>v.</i> Hall.....	103
Hunt <i>v.</i> Boston.....	239, 460, 481	<i>v.</i> Moore.....	13
<i>v.</i> Hammel.....	359, 378	<i>v.</i> Sevatonson.....	268
<i>v.</i> Haskell.....	507, 527	<i>v.</i> Todd.....	153
<i>v.</i> Nevers.....	33	Jacobs <i>v.</i> Rewsen.....	386
Hunter <i>v.</i> Cronkite.....	315	<i>v.</i> Tolty.....	533
<i>v.</i> Hudson.....	372	Jameson <i>v.</i> Ware.....	298
Huntington <i>v.</i> Herrman.....	456	<i>v.</i> Hendricks.....	53, 258
Huntley <i>v.</i> Bacon.....	300	Jamison, <i>In re</i>	478
Hurd <i>v.</i> Darling.....	161		
<i>v.</i> Hubbell.....	478		

TABLE OF CASES CITED

<i>Jaques v. Stewart</i>	316
<i>Jarchow v. Pickens</i>	103
<i>Jarvis v. Rogers</i>	29, 37, 56, 122, 513
<i>Jebeles v. Hutchinson</i>	237, 249
<i>Jefferson v. Hale</i>	365, 460
<i>Jefferson Bank v. Ohio Falls</i>	293
<i>Jefferson Co. v. Gent</i>	376
<i>v. Irvin</i>	86
<i>v. White</i>	70, 85
<i>Jellett v. St. Paul Co.</i>	520
<i>Jenkins v. McConico</i>	311
<i>v. Steamka</i>	393
<i>Jenner v. Joliffe</i>	193
<i>Jennings v. Bank</i>	116
<i>v. Carter</i>	195
<i>v. Gage</i>	184
<i>Jennings Co. v. Oil Co.</i>	460
<i>Jessee, etc. Co. v. Johnston</i>	266
<i>Jewell v. Swann</i>	195
<i>Jewett v. Olesen</i>	97
<i>v. Partridge</i>	258
<i>Jillson v. Wilbur</i>	210
<i>John v. Lindsey</i>	234
<i>John A. Tolman Co. v. Waite</i>	536
<i>John Blaul & Sons v. Wandel</i>	475
<i>Johns v. Nolting</i>	311
<i>v. Schmidt</i>	356
<i>Johnson v. Anderson</i>	358
<i>v. Ashland</i>	370, 374
<i>v. Blandy</i>	315
<i>v. Cent. Bank</i>	416
<i>v. Couillard</i>	247
<i>v. Farr</i>	53
<i>v. Kelly</i>	534
<i>v. Lindstrom</i>	224, 278
<i>v. Lumber Co.</i>	356
<i>v. McConnell</i>	27
<i>v. N. Y. Cent.</i>	520, 521
<i>v. Oregon Co.</i>	356, 357, 373
<i>v. Osborn</i>	292
<i>v. Oswald</i>	386, 387
<i>v. Pennell</i>	389
<i>v. Powers</i>	211
<i>v. Salisbury</i>	424
<i>v. Shank</i>	309
<i>v. State</i>	358
<i>v. Strader</i>	278
<i>v. Stratton</i>	431
<i>v. Sumner</i>	478
<i>v. Wabash R. Co.</i>	370, 371
<i>v. Walker</i>	191
<i>v. Weedman</i>	28
<i>v. White</i>	256
<i>Johnstone v. Whittemore</i>	212, 322
<i>Joliet Co. v. Scioto Co.</i>	34
<i>Jones v. Anderson</i>	250
<i>v. Buzzard</i>	194, 391
<i>v. Fort</i>	66
<i>v. Frum</i>	389
<i>v. Gregg</i>	238
<i>v. Hicks</i>	288

<i>Jones v. Hoar</i>	416, 417, 423
<i>v. Hodgkins</i>	172
<i>v. Horn</i>	366, 466, 471, 519
<i>v. Hunt</i>	12
<i>v. Jackson</i>	200
<i>v. Lamon</i>	526
<i>v. Mellis</i>	30, 31
<i>v. Morgan</i>	449
<i>v. New Haven</i>	139
<i>v. Ortel</i>	122
<i>v. Rahilly</i>	372, 387, 527
<i>v. Sinclair</i>	326, 453
<i>Jordon v. Bryant</i>	308
<i>v. Gillen</i>	313
<i>v. Glover</i>	337
<i>Jos. Dickson Co. v. Paul</i>	315
<i>Joyce v. Sage Bros.</i>	211, 226
<i>Judge v. Curtis</i>	295
<i>Jurey v. Hood</i>	203

K

<i>Kaehler v. Dobberpuhl</i>	381
<i>Kahaley v. Holly</i>	17
<i>Kahn v. Bank</i>	17
<i>Kalekhoff v. Zoerlant</i>	356
<i>Kamerick v. Castleman</i>	506
<i>Kane v. Cook</i>	354
<i>Kans. Cy. Co. v. Shutt</i>	343
<i>Kans. Cy. Ry. Co. v. Brehm</i>	343
<i>v. Wayland</i>	316
<i>Karr v. Barstow</i>	381, 382
<i>Kauffman v. Beasley</i>	307
<i>Kavanaugh v. McIntyre</i>	518
<i>v. Oberfelder</i>	358
<i>v. Taylor</i>	505
<i>Kean v. Zindelowitz</i>	535
<i>Kearney v. Clutton</i>	48, 49, 50, 70, 513
<i>Keating v. T. Haute Co.</i>	388
<i>Keegan v. Kinnare</i>	470
<i>Kehr v. Hall</i>	356
<i>Keith v. Haggart</i>	100
<i>v. Tilford</i>	323
<i>Keller v. Corpus Christi</i>	138, 146
<i>v. Fassett</i>	18, 29
<i>Kelley v. Matlock</i>	36
<i>v. McDonald</i>	460, 527
<i>v. White</i>	66
<i>Kellog v. Fox</i>	226
<i>Kellogg v. Hamilton</i>	532
<i>v. Holly</i>	400
<i>v. Turpie</i>	426
<i>Kelsey v. Griswold</i>	260
<i>Kemp v. Thompson</i>	433
<i>Kemper v. Thompson</i>	48
<i>Kendall v. Duluth</i>	372, 376
<i>Kendrick v. Beard</i>	266
<i>Keniston v. Little</i>	194
<i>Kennedy v. Rosier</i>	33
<i>Kennet v. Robinson</i>	238
<i>Kennett v. Peters</i>	319, 358

TABLE OF CASES CITED

Kenney v. Ranney	3	Kohn v. Richmond	82, 96, 97
Kenning v. Williams	321	Koonce v. Perry	350
Kent v. Whitney	475	Kortright v. Bank	117, 486
Kentgen v. Parks	15, 177	Korus v. Shoffer	104
Kerby v. Quinn	311	Kowing v. Manly	290
Kern v. Wilson	358	Krager v. Pierce	13, 15, 191
v. Woolsey	535	Kramer v. Faulkner	186, 187
Kerner v. Boardman	356	v. Halsey	402
Kerwin v. Balhatchett	226	v. Wood	285
Ketchum v. Brennon	181	Kreider v. Fanning	316
Kewanee Assoc. v. O'Neill	199	Krenzer v. Cooney	191
Keyes v. Prescott	381	Krewson v. Purdon	389, 404,
Kidder v. Biddle	13, 187		452, 537
Kier v. Patterson	499	Kronschnable v. Knoblauch	240
Kiff v. Ry. Co.	71, 95, 97	Kryn v. Kahn	334
Kilgore v. Wood	168, 171, 178	Kuhland v. Sedgewick	402
Killian v. Carroll	294	Kuhn v. McAllister	16
Kilpatrick v. Dean	513	v. Weil	152
Kimball v. Billings	29, 31, 45,	Kullman v. Greenbaum	16, 33, 287
	46, 187, 223	Kuykendall v. Fisher	302
v. Cunningham	192, 210	Kyd v. Cook	526
v. Lohmas	206	Kyle v. Caravello	528, 535
v. Marshall	513	v. Hoyle	274
Kine v. Dale	533	v. Laurens Co.	519
King v. Bates	66, 181		
v. Canal Co.	227	L	
v. Fearson	302	Lack v. Brecht	464, 505
v. Franklin	530	Lacker v. Rhodes	238
v. Merriman	462, 500	Lacombe v. Forestall	39, 61
v. Neel	163	Lafara v. Teal	356
v. Richards	80, 83, 84	La Fayette Bank v. Metcalf	374
v. Wright	382	La Fayette v. Timberlake	131
Kingsbury v. Smith	474, 509	Lake S. Co. v. Hutchins	385, 403
Kinkead v. Holmes, etc. Co.	350	v. Teeters	407
Kinney v. Bank	450	Lamb v. Clark	13
v. Kierman	431	v. Day	529
v. Kruse	293	v. Uteley	210, 236
Kinsey v. Leggett	209	Lamberton v. Windon	33, 293
Kinsman v. State	27	Lampson v. Brander	403
Kintell v. Cushing	181	Langton v. Preston	206
Kipp v. Silverman	433	Lance v. Butler	506, 510
Kirbs v. Provine	344	Land v. Klein	450, 537
Kirk v. Kane	386, 389, 450, 451	Lander v. Propper	101
Kirkman v. Philips	408	Landon v. Emmons	103, 319
Kitchell v. Vandam	177	Lane v. Boicourt	427
Kleppner v. Lemon	511	v. Cameron	37, 64
Kline v. McCandless	507	v. Rosenberg	282
Knapp v. Bank	534	Langdon v. Buel	103
v. Gregory	101	Langhenry v. Bank	321
v. Hobbs	419	Lanier v. Bank	108, 115, 116
v. Miller	387, 395	Lansatt v. Lippincott	285
v. Winchester	279, 312	La Place v. Apouix	265
Knight v. Boates	168	Larkins v. Eckwinzel	348
v. Sackett Co.	313	Larabee v. Peabody	138
v. State	448	Larson v. Dawson	13
Knipper v. Blumenthal	376	Laspeyre v. McFarland	327
Knour v. Wagoner	3	Lathers v. Wyman	477
Knowlton v. Logansport	431	Lathrop v. Blake	300
Knox v. Cook	532	Lauder v. Bechtol	275
v. Eden Co.	187	Laverty v. Snethen	4, 15, 51
Koch v. Branch	30, 45, 50	Lawalsch v. Cooney	13
Koehring v. Aultman	375		

L

TABLE OF CASES CITED

Lawrence v. Buck.....	302	Little v. Gibbs.....	13, 18,
v. Maxwell.....	33, 58, 287		29, 362, 383
v. Simmons.....	69	v. Harrington.....	280
v. Wilson.....	534	v. Lichkoff.....	475
Lawson Adm. v. Lawson.....	416	Little Min. Co. v. Little Chief..	202
Lawton v. Harkins.....	137	Little Rock Bank v. Fisher....	358
v. Steele.....	143	Little Rock Co. v. Glidwell....	89
Layman v. Slocomb... 316, 443,	460	v. Manees.....	340
Lazard v. Wheeler.....	343	Livesay v. Bank.....	369
Lazarus v. Ely.....	509, 529	Lloyd v. Powers.....	308
Leader v. Plante.....	163	Lobdell v. Stowell.... 169, 309,	486
Leary v. Moran.....	390, 393	Lockwood v. Bull.....	301, 326
Le Barron v. Babcock....	163, 167	Loeffel v. Pohlman.....	444
Lee v. Fox.....	104, 513	Loeffler v. Keokuk Line . 80, 381,	518
v. Mathews.....	45	Loetscher v. Dillon.....	490
v. McDonnell.....	532	Logan v. Wallis.....	424
v. McKay.....	444	London Bank v. Arrowstein....	17
Leeper v. Bank.....	332	Long v. Hall.....	533
Le Forest v. Tolman.....	334	v. Lamkin.....	509
Le Grand v. Bank.....	185	Long P. L. Co. v. Saxon Co....	477
v. Swayze.....	452	Longstreet v. Phile.....	472
Leidy v. Carson.....	21	Loomis v. Barker.....	150
Leigh v. Cockwood.....	77	v. Lincoln.....	241
Leitner v. Strickland.....	363	Lorain S. Co. v. Norfolk Co....	275
Leland v. Tousey.....	325	Loring v. Brodie.....	308
Lemon v. Newton.....	132	v. Mulcahy.....	222
Lenthold v. Fairchild.....	46, 213	Louisville Bank v. Royce.....	285
Lentz v. Chambers.....	196	Louisville Co. v. Balch.... 369,	380
Leon v. Kerrison.....	378	v. Barkhouse..... 64, 87, 225,	234
Leonard v. Belknap.....	26, 199	v. Hartwell.....	87
v. Pitney.....	352	v. Kauffman.....	237
v. Todd.....	222	v. Scheinert.....	455
Letell v. Pettit.....	455	Loup v. Cal. Ry. Co.....	380
Le Tung v. Burkhart.....	460	Lovejoy v. Bank..... 470, 512,	528
Levan v. Wilton.....	513	v. Jones..... 68, 260,	266
Levi v. Booth.....	180	v. Michels.....	473
Lewis v. Clark.....	163	v. Murray.....	536
v. Dubose..... 412, 413		Loveless v. Fowler.... 51, 238,	260
v. Galena.....	381	Lovell v. Hammond..... 13, 192,	
v. Hatton.....	456		382, 532
v. Johnson.....	347	v. Shea.....	30
v. Littlefield.....	73	Lowe v. Ozmun..... 213, 370,	378
v. Mason.....	49	v. Miller.....	170
v. McCabe.....	182	v. Wing..... 99, 102,	511
v. Metcalf.....	213	Lowenstein v. Monroe.....	525
v. Ship Success.....	519	Lowremore v. Berry.... 14, 294,	454
v. Tyler.....	227	Lowrey v. Beckner.... 226, 256,	257
Lewis, Admr. v. Mobley.....	319	v. Rainwater.....	145
v. Varnum.....	62	Lowry v. Walker.....	230, 297
Lexington Ry. v. Kidd.....	321	Lucas v. Campbell.....	181
Libbey v. Soule..... 54, 195		v. Harding.....	168
Lichtehein v. Boston Ry....	70	v. Trum.....	290
Lightner v. Lane..... 203, 352		v. Trumbull.....	530
Liles v. Woods.....	334	Luce v. Morehead.....	537
Lillie v. Dunbar.....	516	Luckett v. Townsend.... 34, 39,	60
Lincoln Bank v. Allen.....	14	Luckey v. Gannon.....	57
Lindsay v. Glass.....	443	Lucky v. Roberts.....	242
Linn v. Ross.....	154	Ludden v. Buffalo Co.....	284
Liptrot v. Holmes..... 2, 239		v. Leavitt.....	297, 327
Little v. Boston Co.....	519	Lumbert v. McKenzie.....	352
v. Downing.....	449	Lundie v. Bradford.....	412
v. Fossett.....	289	Lunn v. Howells.....	442

TABLE OF CASES CITED

Lusch <i>v.</i> Huber Co.	513
Lush <i>v.</i> Druse	475
Lux <i>v.</i> Davidson	252
Lyen <i>v.</i> Bond	369
Lyman <i>v.</i> Dow	300
Lynch <i>v.</i> McGhan	460, 490,
	505, 506
<i>v.</i> Ry. Co.	333
Lynn <i>v.</i> State	26
Lyon <i>v.</i> Bertram	402
<i>v.</i> Gates	529
<i>v.</i> Goree	52
M	
McAlister <i>v.</i> Chicago	96
<i>v.</i> Kuhn	122
McArthur <i>v.</i> Green Bay Co.	313
<i>v.</i> Howett	33
<i>v.</i> McGee	36, 60
<i>v.</i> Murphy	422
McAvoy <i>v.</i> Wright	346
McCabe <i>v.</i> Lewis	336
McCaffry <i>v.</i> Carter	381
McCahn <i>v.</i> Hirst	381
McCalla <i>v.</i> Clark	33, 287, 470
McClelland <i>v.</i> Nichols	210
McClendon <i>v.</i> McKissick	203
McClure <i>v.</i> Hill	152, 292, 512
<i>v.</i> Thorpe	164, 310
McCombie <i>v.</i> Davis	253
McCombs <i>v.</i> Guild	425
McConnell <i>v.</i> Leighton	381
<i>v.</i> Stamp	241
McCormick <i>v.</i> Stevenson	444
McCoy <i>v.</i> Brennan	52
<i>v.</i> Daill	52
<i>v.</i> Herbert	328
McCready <i>v.</i> Gaines	307
<i>v.</i> Phillips	510
McCrillis <i>v.</i> Haines	152
McCrum <i>v.</i> Corby	343
McCulloch <i>v.</i> McDonald	89, 520
McDaniel <i>v.</i> Adams	444
<i>v.</i> Nethercutt	275
McDonald <i>v.</i> Danaby	17
<i>v.</i> Mangold	312, 367
<i>v.</i> McKinnon	46, 278
<i>v.</i> Redwing	145
<i>v.</i> Unaka Co.	477
McDonnell <i>v.</i> Potter	353
McDowell <i>v.</i> Steel Works	35
McEhron <i>v.</i> Martine	327
McElhannon <i>v.</i> Alliance	356, 361
McElmurray <i>v.</i> Harris	282
McEntee <i>v.</i> N. Y. S. Co.	84,
	89, 278
McEven <i>v.</i> Jeffersonville	86, 520
McFadden <i>v.</i> Schroedder	394, 405
McGary <i>v.</i> Lafayette	140
McGill <i>v.</i> McGill	153
McGirr <i>v.</i> Sell	182

McGowen <i>v.</i> Chapen	431
McGraw <i>v.</i> Sampliner	530
McGrew <i>v.</i> Armstrong	389, 395
McIntyre <i>v.</i> Whitney	464
McJuroy <i>v.</i> Dyer	508
McKahan <i>v.</i> Ex. Co.	521
McKee <i>v.</i> Judd	313, 343
McKeen <i>v.</i> Converse	316
McKeesport Co. <i>v.</i> Penn. Co.	219
McLain <i>v.</i> Huffman	238
McLaughlin <i>v.</i> Barker	405
<i>v.</i> Harriott	389
<i>v.</i> Salley	310, 421
<i>v.</i> Waite	304
McLemore <i>v.</i> Hawkins	34, 59
McLennan <i>v.</i> Elev. Co.	482
McLennon <i>v.</i> Livingston	361
McLeod <i>v.</i> Ry. Co.	335
McMahon <i>v.</i> Green	195
McMorris <i>v.</i> Simpson	50
McNamara <i>v.</i> Dyer	336
<i>v.</i> New Mallory	29, 439
McNeal <i>v.</i> Macomber	446
McNear <i>v.</i> Atwood	50
McNeil <i>v.</i> Arnold	256
McNeill <i>v.</i> Bank	176
<i>v.</i> Hall	319
McPheters <i>v.</i> Page	2, 45, 213
McShane <i>v.</i> Bank	506
McVeagh <i>v.</i> Bailey	54
MacDonnell <i>v.</i> Loan Co.	239
Machine Co. <i>v.</i> Woodcock	6
Macomber <i>v.</i> Parker	288
Maghee <i>v.</i> Camden Road	79, 521
Maguin <i>v.</i> Dinsmore	79, 232, 518
Mahaney <i>v.</i> Walsh	344
Malachiski <i>v.</i> Stellwagen	102
Maleomb <i>v.</i> O'Reilly	357
Mallory <i>v.</i> Stock Yards	321
Malone <i>v.</i> Abbott	300
<i>v.</i> Robinson	63, 65
Maloon <i>v.</i> Read	223
Manchester <i>v.</i> Tibbetts	101
Manguin <i>v.</i> Hamlet	301
Manlove <i>v.</i> Rogers	191, 308
Mann <i>v.</i> Ladd	460
<i>v.</i> Lamb	6
<i>v.</i> Locke	416, 418
Manning <i>v.</i> Maytubby	389
<i>v.</i> Monaghan	346
Manti Bank <i>v.</i> Peterson	199
Mantonya <i>v.</i> Outfitting Co.	469
Manwell <i>v.</i> Briggs	311
Marchand <i>v.</i> Ronaghan	197
Marcy <i>v.</i> Parker	316, 454
Markel <i>v.</i> Rochester	412
Markham <i>v.</i> Jaudon	486
Marks <i>v.</i> Culimer	196
<i>v.</i> Wright	443
Marsh <i>v.</i> Backus	54
<i>v.</i> Pier	536
<i>v.</i> Whitmore	38

TABLE OF CASES CITED

Marshall <i>v.</i> Davis.....	436	Merrick <i>v.</i> Webster.....	79, 521
<i>v.</i> Ferguson.....	20	Merrick's Estate.....	536
<i>v.</i> Jones.....	175	Merrill <i>v.</i> Ballard.....	350
<i>v.</i> Livingston.....	535	<i>v.</i> Denton.....	102
Marshall Co. <i>v.</i> Ry.....	456	<i>v.</i> How.....	415, 527
Marsters <i>v.</i> Lash.....	392	Mersereau <i>v.</i> Norton.....	157
Martin <i>v.</i> Barrey.....	455	Merz <i>v.</i> Croxen.....	214
<i>v.</i> Cuthbertson.....	64	Messlinger <i>v.</i> Murphy.....	467
<i>v.</i> Megargee.....	6, 126	Metcalf <i>v.</i> Dickman.....	239, 259
<i>v.</i> Moulton.....	307	<i>v.</i> McLaughlin.....	70, 221, 292
<i>v.</i> Music Co.....	228	Metzler <i>v.</i> James.....	101
<i>v.</i> Watson.....	300	Meyer <i>v.</i> Doherty.....	5, 12, 369
Marvin S. Co. <i>v.</i> Norton.....	182	<i>v.</i> Gage.....	54
Maryland <i>v.</i> Pease.....	490	<i>v.</i> Lemeke.....	87
Maryland Co. <i>v.</i> Dalrymple.....	16, 34, 35, 57, 59	<i>v.</i> Munro.....	449
Mason <i>v.</i> Bernard.....	349	<i>v.</i> Orinski.....	197
<i>v.</i> Bowles.....	448	<i>v.</i> Phoenix Co.....	506
<i>v.</i> Griggs.....	272	Meyers <i>v.</i> Gilbert.....	150, 152
<i>v.</i> O'Brien.....	233	Miami <i>v.</i> Port Royal Co.....	93
<i>v.</i> Waite.....	416	Michigan Bank <i>v.</i> Gardner.....	307
Mass. L. Ins. Co. <i>v.</i> Hayes.....	311	Mickey <i>v.</i> St. Louis Co.....	87
<i>v.</i> Fitchburg Co.....	520	Middlesworth <i>v.</i> Sedgwick.....	2
Massey <i>v.</i> Fairn.....	459	Midland Bank <i>v.</i> Ry.....	86
Masterson <i>v.</i> Mount.....	525	Mier <i>v.</i> Wilkens.....	29
Matheny <i>v.</i> Johnson.....	241	Millar <i>v.</i> Allen.....	98, 99
Mather <i>v.</i> Trinity Church.....	25, 324	Miller <i>v.</i> Beck.....	347
<i>v.</i> Chapman.....	204	<i>v.</i> Burch.....	143
Mathew <i>v.</i> Mathew.....	98, 292, 535	<i>v.</i> Grove.....	272
Mathews <i>v.</i> Coe.....	485	<i>v.</i> Hannon.....	197
<i>v.</i> Fisk.....	103	<i>v.</i> Hirschburg.....	394
<i>v.</i> Harsell.....	303	<i>v.</i> Jannett.....	523
<i>v.</i> Livingston.....	493	<i>v.</i> King.....	407, 418
Matteawan Co. <i>v.</i> Bentley.....	444	<i>v.</i> Koges.....	322
Matteson <i>v.</i> N. Y. Cent.....	85	<i>v.</i> Manice.....	398
Matthews <i>v.</i> Densmore.....	193	<i>v.</i> Miles.....	123
Mattice <i>v.</i> Brinkman.....	4	<i>v.</i> Reigue.....	45
Mattingly <i>v.</i> Houston.....	369	<i>v.</i> Schneider.....	307
Maul <i>v.</i> Drexel.....	474	<i>v.</i> Smith.....	265
Mauldin <i>v.</i> Clark.....	325	<i>v.</i> Thompson.....	226
Maury <i>v.</i> Cole.....	464	<i>v.</i> Waite.....	452
Maximilian <i>v.</i> New York.....	131	<i>v.</i> Winfree.....	445
Mayor of N. Y. <i>v.</i> Lord.....	145	Milligan <i>v.</i> Mackinlay.....	316
Mayor of S. <i>v.</i> Mulligan.....	144	Milliken <i>v.</i> Hathaway.....	49
Mecklin <i>v.</i> Denning.....	381	Million <i>v.</i> Medaris.....	349
Meise <i>v.</i> Wachtel.....	217	Mills <i>v.</i> Britton.....	278
Meixell <i>v.</i> Carr.....	354	<i>v.</i> Gilbreth.....	33
<i>v.</i> Kirkpatrick.....	213, 516	Mine Co. <i>v.</i> White.....	202
Melody <i>v.</i> Chandler.....	102	Mining Co. <i>v.</i> Mining Co.....	510
Melville <i>v.</i> Brown.....	157	Mininger <i>v.</i> Banning.....	293
Merchants Bank <i>v.</i> Frost.....	234, 356, 357	Minor <i>v.</i> Beveridge.....	489
<i>v.</i> Seaboard Co.....	217	Miss. Mills <i>v.</i> Bannan.....	455
<i>v.</i> State Bank.....	58, 287	<i>v.</i> Meyer.....	464, 529
<i>v.</i> Treholm.....	240, 307	Mitchell <i>v.</i> Harcourt.....	524
<i>v.</i> Union Co.....	86	<i>v.</i> Printup.....	535
Merchants Co. <i>v.</i> Merriam.....	86	<i>v.</i> Ry.....	88
<i>v.</i> Moore.....	247	<i>v.</i> Thomas.....	454
Mer. Nat. Bank <i>v.</i> Richards.....	405	Mithroff <i>v.</i> Carrolton.....	147
<i>v.</i> Williams.....	478, 505	Mobile Co. <i>v.</i> Randall.....	380
Merkl <i>v.</i> Beidleman.....	449	Mobile Ry. <i>v.</i> Bay Shore Co.....	379
Merrick <i>v.</i> Hulbert.....	449	<i>v.</i> Humphries.....	128
		Mo. etc. Co. <i>v.</i> Davidson.....	519
		<i>v.</i> Heidelberg.....	89

TABLE OF CASES CITED

Moir v. Hopkins	224
Mohr v. Langan	5
Monmouth Bank v. Dunbar	226
Monnot v. Ibert	265
Montague v. Montgomery	228
Montalvan v. Clover	336
Montgomery v. Brush	437, 452
Montgomery Co. v. Chapman	8
Moody v. Blake	185
v. Caulk	478
v. Drown	242
v. Keener	362
v. Whitney	207, 495, 503
Moon v. Raphael	367
Moore v. Aldrich	453
v. Baker	122
v. Hill	415
v. McKiffin	384
v. Murdock	102
v. Refrigerator Co.	238, 260
Mo. Pac. v. Peru Co.	460, 461
Moran v. Blankington	382
v. Portland Co.	289, 319
v. Snell	234
More v. Burgher	247
Moreford v. Peck	431
Moreland v. Myall	20
Moreley v. Roach	240, 260
Moret v. Mason	214, 503
Morey v. Hoyt	452, 453
Morgan v. Dod	34, 59
v. Hodges	187
v. Ide	282
v. Kidder	530
v. Negley	20
v. Tenor	353
v. Varrick	324
Morrill v. Goodenow	15
v. Moulton	3, 254
Morris v. Bank	534
v. Bills	246
v. Smith	506
v. Thompson	217, 537
Morris Co. v. Lewis	58
Morrison v. Rogers	424
v. Robinson	499
Morrow Co. v. N. Eng. Co.	49, 185
Morse v. Crawford	322
Mortimer v. Marder	537
Morton v. Gloster	64, 67, 71
v. Preston	15, 122, 518
Moseley v. Wilkinson	290
Moses v. Arnold	416, 417
v. Norris	231
v. Taylor	352
Mott v. Cook	415
Mount v. Cufferly	378
v. Derick	45
v. Wood	447
Movers v. Wait	325
Mowery v. Salisbury	27
Mowrey v. Wood	29, 522

Mowry <i>v.</i> White.....	200
Moynahan <i>v.</i> Prentiss.....	237, 377
Mueller <i>v.</i> Olson.....	21
<i>v.</i> Rebham.....	449
Mulheisen <i>v.</i> Lane.....	300, 381, 384
Mullens <i>v.</i> Ballock.....	448
Mulligan <i>v.</i> Bailey.....	320, 321
Mulliner <i>v.</i> Shumake.....	405, 534
Mulloy <i>v.</i> People.....	26
Munford <i>v.</i> Mackay.....	163
Munier <i>v.</i> Zachary.....	22, 433, 456
Munn <i>v.</i> McDonald.....	32
Munroe <i>v.</i> Armstrong.....	523
Munson <i>v.</i> Hollowell.....	353
Murphy <i>v.</i> Burling.....	50, 507
<i>v.</i> Hobbs.....	3, 210, 455
<i>v.</i> Kaufman.....	65
<i>v.</i> Sherman.....	460
<i>v.</i> Sioux City Co.....	205
<i>v.</i> Virgin.....	12, 234
Murray <i>v.</i> Mace.....	195
Muse <i>v.</i> Wright.....	249
Muskegon Co. <i>v.</i> Hendricks.....	13
Mut. Life Ins. Co. <i>v.</i> Allen.....	522
<i>v.</i> Raymond.....	380
Myers <i>v.</i> Ex. Co.....	490, 516
<i>v.</i> Farrell.....	524
<i>v.</i> White.....	22
Mvrick <i>v.</i> Bill.....	248

N

Nabring <i>v.</i> Bank of Mobile.....	287
Nance <i>v.</i> Georgia Ry. Co.	370, 371
Nanman <i>v.</i> Caldwell.....	275
Nanson <i>v.</i> Jacob.....	70, 97, 221
Nash <i>v.</i> Adams.....	383
Nashville Lbr. Co. <i>v.</i> Barifield.....	202
Nashville Ry. Co. <i>v.</i> Karthaus.....	25
<i>v.</i> Walley.....	533
Nat'l Bank <i>v.</i> Baker.....	34
Nat'l Bank <i>v.</i> Graham.....	106
<i>v.</i> Lake Shore Ry. Co.....	108
Nat'l Ex. Bank <i>v.</i> Graniteville Co.....	284
Nat'l L. Assoc. <i>v.</i> Thompson.....	441
Nat'l S. Ship Co. <i>v.</i> Tregman.....	395
Nat'l Trust Co. <i>v.</i> Gleason.....	411
Nations <i>v.</i> Hawkins Admr.....	77
Neal <i>v.</i> Hanson.....	64
Neb. M. Mills <i>v.</i> St. L. etc. Co.....	88
Neder <i>v.</i> Jennings.....	533
Needham <i>v.</i> Hill.....	164
Neff <i>v.</i> Wellesley.....	139
Negus <i>v.</i> Simpson.....	464
Neiler <i>v.</i> Kelly.....	15, 120
Neilson <i>v.</i> Slade.....	159
Nelson <i>v.</i> Edwards.....	58
<i>v.</i> Iverson.....	70, 221, 441, 449
<i>v.</i> King.....	69, 272
<i>v.</i> Merriam.....	4
<i>v.</i> Patton.....	279

TABLE OF CASES CITED

Nelson <i>v.</i> Schmoller	214	O'Brien <i>v.</i> Hilburn	325, 454
<i>v.</i> Whetmore	230	Odiorne <i>v.</i> Cooley	315, 316, 433
Nesbit <i>v.</i> St. P. Lbr. Co.	207, 496	O'Donaghue <i>v.</i> Corby	29, 272
Nesbitt <i>v.</i> Lbr. Co.	478	Oestrich <i>v.</i> Greenbaum	54
<i>v.</i> Moore	514	Ogden <i>v.</i> Lanthrop	58
Newby <i>v.</i> Harrell	164	<i>v.</i> Lucas	236
Newcomb Co. <i>v.</i> Baskett	68, 507	O'Herron <i>v.</i> Gray	14
Newhall <i>v.</i> Paige	75	Ohio, etc. Co. <i>v.</i> Yoke	95, 97
New Jersey Mfg. Co. <i>v.</i> Barth	537	Okla. <i>v.</i> Lbr. Co.	460
Newlin <i>v.</i> Prevo	234, 321	Okla. City <i>v.</i> Rich. Lbr. Co.	275
New Liverpool Co. <i>v.</i> Western Co.	313	Olds <i>v.</i> Chicago B. of T.	30
Newman <i>v.</i> Kane	460	Oleson <i>v.</i> Merrill	8, 256
<i>v.</i> Munk	29	Oliver <i>v.</i> Worcester	138
<i>v.</i> Mert. Co.	275	Oliver Ditson Co. <i>v.</i> Bates	448
Newton <i>v.</i> Cardwell Co.	307	Omaha, etc. Co. <i>v.</i> Tabor	9, 163, 175
<i>v.</i> Porter	207	Onderkirk <i>v.</i> Bk.	63
Nichols <i>v.</i> Gage	51, 68	O'Neill Mfg. Co. <i>v.</i> Woodley	513
Nichols, etc. Co. <i>v.</i> Thresher Co.	370, 390	O'Reer <i>v.</i> Strong	417
Nickerson <i>v.</i> Bradbury	382, 383	Orlando <i>v.</i> Pragg	144
Nickey <i>v.</i> Zonker	348	Ormsby <i>v.</i> Cooper Co.	489
Nightingale <i>v.</i> Scannel	530	Oronson <i>v.</i> Applegard	464
Nilting <i>v.</i> Thomasson	517	Orton <i>v.</i> Butter	13
Nininger <i>v.</i> Banning	537	O'Rourke <i>v.</i> Sioux Falls	131, 137
Nisbet <i>v.</i> Patton	149	Osborn <i>v.</i> Bell	411
Nixon <i>v.</i> Brown	179	<i>v.</i> Potter	19
Nodle <i>v.</i> Hawthorn	449	Osborne <i>v.</i> Elevator	203
Noland <i>v.</i> Clark	293, 515	Ott <i>v.</i> Hood	354
Noles <i>v.</i> Marable	288	Overby <i>v.</i> McGhee	289, 319
Noonan <i>v.</i> Ilsey	482	Overstreet <i>v.</i> Nunn	272
Norden <i>v.</i> Jones	408, 423	Overton <i>v.</i> Williston	19, 215, 310, 316
Nordhaus <i>v.</i> Peterson	524	Oviatt <i>v.</i> Pond	525
Norman <i>v.</i> Eckern	191	<i>v.</i> Sage	160
<i>v.</i> Horn	373, 374	Owen <i>v.</i> Long	211
<i>v.</i> Rogers	455, 530	<i>v.</i> Williams	126, 530
Norris <i>v.</i> McCanna	197	Owens <i>v.</i> Weadman	209, 356, 533
<i>v.</i> Sowles	101		
North Pa. Ry. Co. <i>v.</i> Comm. Bk.	85, 87, 92		
Northern Tr. Co. <i>v.</i> Sellick	481		
Northness <i>v.</i> Hillestad	359		
Northrup <i>v.</i> McGill	529		
Northwestern Bk. <i>v.</i> Silberman	212		
Norton <i>v.</i> Boxter	39, 177		
<i>v.</i> Rockey	26		
Norwegian Co. <i>v.</i> Hawthorne	53		
Norwegian Plow Co. <i>v.</i> Haines	394		
Nourse <i>v.</i> Prime	57		
Nowlen <i>v.</i> Colt	159		
Noyes <i>v.</i> Stone	191		
Nugent <i>v.</i> Adsit	383		
Nutt <i>v.</i> Wheeler	233		
Nutter <i>v.</i> Varney	75, 228		
N. Y. Ins. Co. <i>v.</i> Allison	531		
<i>v.</i> Nat'l Pro. Ins. Co.	397		
N. Y. Mut. L. Ins. Co. <i>v.</i> Garland	349		
N. Y., etc. Ry. Co. <i>v.</i> Harnig	106		
N. Y. Ry. <i>v.</i> Schuyler	17, 117		
O			
Oakley <i>v.</i> Randolph	191, 213		

P

Paalzon <i>v.</i> Est. Co.	370
Pac. Ex. Co. <i>v.</i> Shearer	90, 91
Pac. L. S. Co. <i>v.</i> Isaacs	22, 321
Packard <i>v.</i> Getman	79, 88, 231, 454
Paden <i>v.</i> Goldbaum	392
Page <i>v.</i> Thrall	298
Page Co. <i>v.</i> Smith	397
Paige <i>v.</i> Carroll	352
<i>v.</i> O'Neal	374
Paine <i>v.</i> British Co.	358
Painter <i>v.</i> McGaba	315
Palmer <i>v.</i> Forbes	101
<i>v.</i> Hand	295, 308
<i>v.</i> McMaster	533
<i>v.</i> O'Rourke	367
<i>v.</i> Shenkel	195
Parish <i>v.</i> Wheeler	511
Park <i>v.</i> McDaniels	527
Parker <i>v.</i> Bank	316, 358
<i>v.</i> Barlow	76
<i>v.</i> Brown	310
<i>v.</i> Chambers	344, 383
<i>v.</i> Dean	300

TABLE OF CASES CITED

Parker v. Goddard	310	Perrigo Co. v. Grimes	511
v. Latner	71	Perrin v. Barnard	296
v. Middlebrook	217	v. Chaplin	54
v. Rodes	380, 383	v. Wells	460
v. Waycross Co.	504	Perry v. Beaupre	310
v. Webb	337	v. Granger	163
v. Wise	27	v. Musser	369, 377
Parkham v. McMurray	529	Person v. Wilson	163
Parlin & C. Co. v. Hanson	372, 450	Peters v. Lindsborg	140
Parmenter v. Fitzpatrick	475	Peterson v. Gresham	527
Parrot v. Byers	377	Petit v. Bonju	13
Parsons v. Martin	481	v. Mercer	524
v. Webb	256	Petrie v. Williams	348
Paton v. Joliff	306	Pettes v. Marsh	298
Pattee v. Gilmore	151, 229, 269, 270, 280, 347	Pettibone v. Phelps	457
v. McCabe	366	Pettingill v. Rideout	32
Patten v. Baggs	75	Phalen v. Clark	73
Patterson v. Anderson	381	Phares v. Barbour	104
v. Clark	389	Pharis v. Carver	369
Patton v. Overton	336	Phelps v. Church	425
Paul v. Hayford	101	v. Delmore	54, 195
Payne v. Davis	282	Phelps Co. v. Halsell	279
v. Elliott	9, 119, 120, 372, 456	Philbrook v. Kellogg	509
v. Green	195	Phillips v. Brigham	79, 383, 521
Peacock v. Feaster	378, 535	v. Mihram	356, 363
v. Hendricks	320	v. Shackford	275
Pearce v. Bowker	175	Phoenix Co. v. Malrath	388, 391
Pearsoll v. Chapin	407, 416	Piazzek v. Harmon	244
Pease v. Smith	175, 233, 246, 248, 374, 446	Pick v. Minneapolis	141
Pecha v. Kastle	533	Pickens v. Yarborough	33
Peck v. Inlow	511	v. Oliver	345
Peckham Co. v. Harper	153, 527	Pickering v. Moore	199
Peckinbaugh v. Quillan	510	Pico v. Kalisher	387
Pekin Co. v. Wilson	372	Picquet v. McKay	227, 398
Pemberton v. Smith	394	Pierce v. Benjamin	241, 471, 529
Pengra v. Wheeler	506	v. Evans	194
Penland v. Leatherwood	357	v. Goddard	19, 205
Penniman v. Winner	464	v. Housbrouck	103
Pennington v. Redman	528	v. Jackson	154
v. Storage Co.	493	v. So. Pac.	520
Penn. Ins. Co. v. Ry.	490	Pike v. Wright	416
Penn. Ry. Co. v. Hughes	315, 452	Pilsbury v. Webb	242, 263
v. Stern	86, 88, 92	Pinckney v. Darling	456
People v. Bank	13, 31	Pine v. Morrison	245
v. Board of Health	142, 143	Pingree v. Detroit	70, 96
v. Griffin	31	Pinkerton v. Ry.	117, 483
v. Hall	53	Pinkham v. Gear	29
v. Malone	352	Pitt v. Petway	163
v. McMaster	26	Plano Co. v. Elev. Co.	259
v. Security Co.	522	Platner v. Johnson	21
People's Bank v. Huttig Co.	306	Platt v. Potts	18
v. Ry. Co.	260	v. Tuttle	191
Perham v. Coney	65, 225	Plefka v. Detroit Co.	412
Perkins v. Boardman	227	Plummer v. Brown	218
v. Ewan	475	v. Green	469
v. Marrs	344, 403, 506	v. Reeves	530
v. McCullough	223	Podlech v. Phelan	402
v. Portland Co.	521	Polhemis v. Annin	380
Perley v. Dale	316	Polk v. Allen	238, 535
Perminter v. Kelly	157	Pollard v. Thomason	52
		Polley v. Iron Works	224
		Pollock v. Bank	109

TABLE OF CASES CITED

Pollock v. Douglas	101
Pomeroy v. Smith	288
Poole v. Symonds	327
Poor v. Dunkwern	216
Poppers v. Peterson	270
Porrell v. Cavanaugh	239
Porter v. Duncan	338
v. Foster	246, 258
v. Hermann	354
v. Miller	8
v. Smith	352
Port Huron Co. v. Engine Works	217
Portland Bank v. Stubbs	234
Posey v. Gamble	534
Potter v. Bank	58, 392, 439, 515
v. Lohse	349
v. Neal	169
v. Thompson	61
Potts v. N. Y. Road	93
v. Paxton	490
Pound v. Pound	455
Powell v. Hill	170
v. Myers	85, 89
v. Robinson	80
Powers v. Hatter	325, 439
v. Hubbell	227
v. Klune	6
v. Sawyer	348, 535
Prater v. Wilson	534
Pratt v. Brewster	13
v. Ry	110
Prentice Co. v. Page	285, 307
Prescott v. Ward	76
v. Wells Fargo	19
v. Wright	241, 529
Preston v. Leighton	202, 510
v. Wetherspoon	181
Pribble v. Kent	527
Pridgin v. Strickland	354, 382, 505
Priest v. Way	456
Prime v. Cobb	256
Prince v. State Fair	76
Prinz v. Moses	530
Pritchell v. Reynolds	343
Probst v. Skillen	365
Proctor v. Cole	374, 375
v. Irvin	403
Pryor v. Portsmouth	388
Pulcifer v. Page	204
Pullen v. Bell	215, 272
Pumpelly v. Green Bay Co.	136
Pundman v. Shoenich	150
Purchase v. Bank	118
Purves v. Moltz	242
v. Piercy	20
Putnam v. Osgood	441
v. Wise	423

Q

Quimby v. Blackey	353
v. Lowell	407, 417

R

Race v. Chandler	275
v. Moore	455
Railroad Co. v. Hutchins	23, 356, 498, 503, 504
Railway Co. v. Jones	504
v. Odil	520
v. O'Donnell	96, 97, 374
Rains v. McNairy	157, 163
v. Perryman	321
Rakestraw v. Floyd	3, 531
Rall v. Cook	471, 513
Ralston v. Bk.	118, 518
Ramirez v. Main	236, 362, 365
Ramsby v. Beezley	213, 253
Ramsey v. Hurley	403
Rand v. Freeman	440
v. Nesmith	416
v. O'Hord	226
Randette v. Judkins	361, 383
Randolph Iron Co. v. Elliott	228, 416
Rank v. Rank	367, 530
Rankin v. Greer	101
v. McCullough	35, 61
Ranons v. Hughes	248
Ratchiff v. Vance	267
Rawley v. Brown	259
Ray v. Davison	241
v. Light	275, 349
v. Tubbs	28, 66, 67
Raymond v. Blancgrass	360
v. Gutentag	321
R. C. Stewart D. Co. v. Hirsch	452
Read v. Middleton	202
Reamer v. Ex. Co.	5
Reaner v. Morrison Ex. Co.	399, 527
Reardon v. Patterson	61, 359
Recht v. Glickstein	364
Rector v. Thompson	274
Redewill v. Gillen	182
Redington v. Chase	171
v. Nurnan	526
Reed v. McKill	357
Reeder v. Sayre	345
Reese v. Bank	117
v. Lion	101
Reeves v. Nye	350
v. Plough	60
Rehberg v. Mayor	138
Reid v. Butt	438
v. Colcock	21
v. Coldwell	126
Reid, etc. v. Ferris	382
v. Goned	532
v. King	199, 202, 203
v. Kirk	309
Reish v. Reynolds	367, 376
Reiss v. Hanchett	203
Reitzenstein v. Marquardt	76, 350
Rembaugh v. Phipps	70, 221

TABLE OF CASES CITED

Renfro v. Hughes.....	527, 530	Robinson v. Greenville.....	131
Renick v. Boyd.....	323	v. Hartridge.....	6, 247
Rew v. Maynes.....	294	v. Hodgson's Ex.....	306
Rexroth v. Coon.....	26, 312	v. Holt.....	198
Reynolds v. Fitzpatrick....	239, 359	v. Hurley.....	35, 60, 460
v. Hennessy.....	353	v. Kaplan.....	228
Reynolds Bk. Co. v. Nusler....	455	v. Kruse.....	103
v. N. Y. T. Co.....	426	v. McDonald.....	252
v. Padgett.....	410	v. Peru P. Co.....	334, 389, 452
v. White.....	33, 286	v. Skipwith.....	187
R. F. Scott Co. v. Kelly.....	524	v. Way.....	250
Rhoades v. Drummond.....	239	Rochester Lbr. Co. v. Locke....	325
Rhodes v. Lowrey.....	261	Rocky v. Burkshalter.....	210
Ribble v. Lawrence.....	453	Rodick v. Coburn.....	64, 214, 226
Rice v. Hollenbeck.....	503	Rodney Hunt Mfg. Co. v. Stew-	
v. Yocum.....	257, 268	art.....	67
Rich v. Bk. of Lincoln.....	123	Roeder v. Green Tree Brew....	288
Richardson v. Ashby.....	14, 62,	Rogers v. Combie.....	532
245, 470		v. Darnaby.....	300
v. Hall.....	53, 364, 369, 378	v. Dutton.....	316, 533
v. Rich.....	93	v. Greenbush.....	419
v. Stevens.....	3	v. Huie.....	31, 49
Richmond v. Bronson.....	478	v. Inc. Co.....	39, 177
Richtmeyer v. Remsen.....	343	v. King.....	397, 404
Ricketts v. Dowill.....	207	v. Moore.....	536
v. Ungarst.....	194	v. Troyman.....	460
Riddle v. Driver.....	205, 496	v. Whitehouse.....	181
Rider v. Robbins.....	304	Rohier v. Babcock.....	309
Riford v. Montgomery.....	245	Roland v. Bk.....	61
Riley v. Littlefield.....	526	Rolfe v. Dudley.....	151, 191, 194
v. Martin.....	460	Romaine v. Van Allen.....	124, 484
Ring v. Neale.....	319, 435	Rome v. Haines.....	293
Rio Grande Co. v. Burns.....	17	Rome Ry. Co. v. Sloan.....	478
Ripley v. Davis.....	161, 263, 461	v. Sullivan.....	383
v. Dolbier.....	102, 319	Romero v. Newman.....	14
v. Paige.....	440	Roming v. Way.....	392
v. Power Co.....	256	Roady v. Cox.....	156, 164
Risley v. Squire.....	382	Root v. Chandler.....	289
Rivinus v. Langford.....	490	v. French.....	184
Roach v. Turk.....	50	v. Stevenson.....	188
Robe v. Jourdon.....	248	Rosekrans v. Barker.....	155
Roberts v. Evans.....	426	Rosenan v. Syring.....	19
v. Morris.....	259	Rosenback v. Bank.....	111
v. Stuyvesant Safe Dep. Co..	396	Rosenbaum v. Davis.....	275
v. Yarboro.....	278	v. Stiebel.....	489
Robertson v. Crane.....	267	Rosencranz v. Swofford Bros....	316
v. Dunn.....	419	Rosenfeld v. Ex. Co.....	520
v. Ellis.....	360	Rosenkrantz v. Jacobwitz.....	246
v. Frost.....	386	Rosenthal v. Walker.....	353
v. Gourley.....	282	Rosenzweig v. Fraser.....	50, 57,
v. Hardy.....	374	68, 287, 513	
v. Hunt.....	348	Ross v. Clark.....	261
v. Jones.....	23, 495, 499	v. Malone.....	366
v. Nat'l S. Co.....	521	v. McDuffie.....	516
Robertson Co. v. Rilpe et al	378, 490	v. McGuffin.....	341
Robinson v. Alexander.....	478	v. Philbrick.....	194
v. Armstrong.....	334, 341	v. Ry.....	518
v. Baker.....	83, 94	Rosum v. Hodges.....	257, 490
v. Barrows.....	460	Rotan v. Fletcher.....	453
v. Bird.....	48, 49	Rotch v. Hawes.....	27, 64
v. Burleigh.....	74, 271, 276	Rothchild v. Schwartz.....	13
v. Dickey.....	171	Rowley v. Bigelow.....	185

TABLE OF CASES CITED

Royce v. Oakes.....	12, 13, 374
Rugg v. Barnes.....	319
Ruggles v. Nantucket.....	147
Ruppel v. Al. Val. Co.....	521
Rusher v. Dallas.....	137
Russell v. Cole.....	465, 468, 529
v. Huiskamp.....	460
v. Kearney.....	469
v. Mayor.....	146
v. McCall.....	460, 469
v. Richards.....	19
v. Walker.....	196
Ruthland Co. v. Bank.....	532
v. Thrall.....	124
Ryan v. Brant.....	241, 243
v. Chown.....	305
v. Hurley.....	365
v. Young.....	464
Ryburn v. Pryor.....	460
Ryder v. B. C. Co.....	89
v. Hathaway.....	202, 209
Ryers v. Weir.....	278
Ryerson v. Kentfield.....	97
v. Ryerson.....	275
Ryman v. Gerlach.....	191

S

Sadler v. Sadler.....	191
Sale v. Shipp.....	528
Salem Co. v. Anson.....	12, 363, 364
Salida Assoc. v. Davis.....	249
Salisbury v. Barton.....	372
Salliday v. Johnson.....	452
Salt S. Bank v. Wheeler.....	63, 248
Salt, etc. Co. v. Hickey.....	516
Saltmarsh v. Chicago Co.....	460
Salts v. Everett.....	30, 48, 92, 181, 184, 374
Sammis v. Ely.....	196
Samuel v. Cheney.....	90
Sanburn v. Coleman.....	68, 321
v. Morrill.....	162
Sandeen v. Ry.....	341, 344, 411
Sanders v. Keber.....	183
v. Stokes.....	440
v. Vance.....	460
Sands v. Pfeiffer.....	325
Sanford v. Gluson.....	369
San Pedro Co. v. Reynolds.....	354
Saratoga Co. v. Hazard.....	374
Sargeant v. Blunt.....	51
Sargent v. Franklin Co.....	517
v. Gile.....	274
v. Metcalf.....	182
v. Sturm.....	244, 378
Saterlee v. Melick.....	410
Saunders v. Clark.....	477
Savage v. Darling.....	69, 396
Savanah Co. v. Wilcox.....	95
Savannah Co. v. Sloat.....	80
Sawyer v. Kenan.....	455
v. Portsmouth Co.....	78

Sawyer v. Robertson.....	356, 359
v. Wilson.....	194
Saxton v. Graham.....	200
v. Williams.....	103
Seanz v. Martin.....	12
Scarboro v. Goethe.....	531
Scarborough v. Rowan.....	294, 358
v. Webb.....	220
Schaeffer v. Marienthal.....	346
Schaeffner v. Emp. L. Co.....	399
Schenk v. Strong.....	188
Schenter v. Jacobs.....	195
Schile v. Brokhahus.....	526
Schmacker v. St. Louis.....	144
Schmidt v. Bank.....	369, 375
Schmittiel v. Moore.....	469
Schoenrock v. Farley.....	389
Schofield v. Whitelegge.....	374
Schonton v. McIntosh.....	427
Schroepel v. Corning.....	226
Schryer v. Fenton.....	453
Schultz v. Becker.....	534
Schwacker v. Riddle.....	154
Schwartz v. Davis.....	526
Schwitters v. Springer.....	460, 505
Scollans v. Rollins.....	14, 177
Scollard v. Brooks.....	534
Scott v. Bank.....	295
v. Childers.....	460
v. Crane.....	272
v. Hodges.....	242
v. Lance.....	419
v. Tampa.....	137
v. Whittemore.....	298
Scoville v. Glasner.....	382
Scribner v. Master.....	234
Scrivener v. Woodward.....	236, 238
S. D. Slavey Co. v. Union Co.....	520
Seaboard Co. v. Phillips.....	530
Seago v. Pomeroy.....	226
Seaman v. Luce.....	514
Searcy v. State.....	390
Seattle Co. v. Haley.....	524, 528
Security Bank v. Fogg.....	14, 51
Sedgwick v. Place.....	478
Seele v. Deering.....	136
Seivert v. Galvin.....	195
Selkins v. Goodale.....	195
Selkirk v. Cobb.....	476
Sell v. Ward.....	493
Semon v. Adams.....	239, 246
Semple Co. v. Detwiler.....	33
Seneca Nation v. Hamwood.....	260
Sentell v. Ry. Co.....	27
Sewall v. Bank.....	120
Sexton v. Graham.....	200
Seymour v. Bruske.....	446
v. Elev. Co.....	268
v. Ives.....	516
v. Van Curen.....	535
v. Wyckoff.....	203
Shamburg v. Moorehead.....	283

TABLE OF CASES CITED

Shandy <i>v.</i> McDonald.....	373	Skeen <i>v.</i> Engine Co.....	381
Shapiro <i>v.</i> Barney.....	20	Skiff <i>v.</i> Stoddard.....	37, 57, 287
Sharp <i>v.</i> Parks.....	31, 187	Skinner <i>v.</i> Dodge.....	308
Sharpe <i>v.</i> Bank.....	35, 59	<i>v.</i> Pinney.....	22, 316, 437, 454, 460, 503
<i>v.</i> Barney.....	341	Sleeper <i>v.</i> Davis.....	418
<i>v.</i> Graydon.....	528	Slingerland <i>v.</i> Morse.....	272
<i>v.</i> U. S.....	473	Sloan <i>v.</i> Lick Creek Co.....	13, 374
Shaughnessy <i>v.</i> Chase.....	122	Smith <i>v.</i> Anderson.....	529
Shaw <i>v.</i> Adams.....	365	<i>v.</i> Au Gres Tp.....	204
<i>v.</i> Bank.....	87	<i>v.</i> Bank.....	517, 538
<i>v.</i> Coffin.....	412, 414	<i>v.</i> Benson.....	14
<i>v.</i> Kaler.....	313, 326	<i>v.</i> Briggs.....	349
<i>v.</i> Ry.....	85	<i>v.</i> Colby.....	278
Shea <i>v.</i> Milford.....	234	<i>v.</i> Condry.....	335
Sheehan <i>v.</i> Levy.....	101	<i>v.</i> Conner.....	366
Shelby Co. <i>v.</i> Bragg.....	353	<i>v.</i> Day.....	347
Sheldon <i>v.</i> Ex. Co.....	466, 469	<i>v.</i> Demarrais.....	210
<i>v.</i> Skinner.....	165	<i>v.</i> Donahue.....	13, 316, 456
Shellenberg <i>v.</i> Freemont Co.....	82	<i>v.</i> Downs.....	455
Shepard <i>v.</i> Levenson.....	26	<i>v.</i> Durham.....	14
<i>v.</i> Milwaukee.....	526	<i>v.</i> Force.....	359
Sheridan <i>v.</i> N. Q. Co.....	81	<i>v.</i> Goff.....	516
<i>v.</i> Presas.....	39, 177	<i>v.</i> Grove.....	338
Sherman <i>v.</i> Finch.....	481, 511	<i>v.</i> Hartog.....	277
<i>v.</i> Mathews.....	197	<i>v.</i> Hawley.....	532
<i>v.</i> Way.....	215	<i>v.</i> Hutchinson.....	402
Sherry <i>v.</i> Picken.....	259	<i>v.</i> Jernigan.....	407
Sherwood <i>v.</i> Meadow Co.....	187	<i>v.</i> Kennett.....	343
<i>v.</i> Sutton.....	353	<i>v.</i> Kershaw.....	193
Shewalter <i>v.</i> Wood.....	490	<i>v.</i> Konst.....	99
Shields <i>v.</i> Dodge.....	28	<i>v.</i> Mayberry.....	318
Shoemaker <i>v.</i> Simpson.....	207, 256	<i>v.</i> McLean.....	259
Shotwell <i>v.</i> Few.....	44	<i>v.</i> Mining Co.....	118
Shrimpton <i>v.</i> Culver.....	15	<i>v.</i> Morgan.....	348
Shriner <i>v.</i> Meyer.....	261	<i>v.</i> Rochester.....	132
Shultz <i>v.</i> Christman.....	344	<i>v.</i> Savin.....	38, 489
Shumway <i>v.</i> Rutter.....	252	<i>v.</i> Schulenberg.....	249
Sibley <i>v.</i> Ives.....	13	<i>v.</i> Smalley.....	252, 292
<i>v.</i> Story.....	299	<i>v.</i> Smith.....	417, 536
Siegel, etc. Co. <i>v.</i> Holly.....	334, 474, 478	<i>v.</i> Tankersley.....	413
Silsbury <i>v.</i> McCoon.....	205	<i>v.</i> Thompson.....	313, 343, 369
Silver <i>v.</i> Holden.....	380	<i>v.</i> Tindall.....	309
Silverman <i>v.</i> Bush.....	307	<i>v.</i> Wadleigh.....	298
<i>v.</i> McGrath.....	528	Smith Co. <i>v.</i> Webster.....	29
Silvey <i>v.</i> Tift.....	406	<i>v.</i> Wood.....	209
Simes <i>v.</i> Zane.....	381	<i>v.</i> Young.....	266
Simmer <i>v.</i> St. Paul.....	525	<i>v.</i> Zink.....	192
Simmons <i>v.</i> Anderson.....	322	Smoot <i>v.</i> Cook.....	389, 452
<i>v.</i> Jenkins.....	101, 102	Snodgrass <i>v.</i> Bank.....	352
<i>v.</i> Lillystone.....	3	Snyder <i>v.</i> Baker.....	370, 378
<i>v.</i> Sikes.....	6, 128	<i>v.</i> Vaux.....	207
<i>v.</i> Spencer.....	346	Somerset Co. <i>v.</i> Veghte.....	352
Simms <i>v.</i> James.....	68	Sonter <i>v.</i> Baymore.....	78
Simpkins <i>v.</i> Rogers.....	207, 215	So. Co. <i>v.</i> Crook.....	89
Simpson <i>v.</i> Alexander.....	460, 478	So. Ex. Co. <i>v.</i> Dickson.....	89
<i>v.</i> Carlton.....	292	<i>v.</i> Palmer.....	381, 384
Singer Co. <i>v.</i> Graham.....	182	So. Ry. <i>v.</i> Attalia.....	234, 357
<i>v.</i> King.....	46, 74, 278	<i>v.</i> Jones.....	518
<i>v.</i> Skillman.....	536	<i>v.</i> Steel Co.....	337
Single <i>v.</i> Schneider.....	23, 496	Southwest Co. <i>v.</i> Cobble.....	226,
Sings <i>v.</i> Joliet.....	145		238, 455
Sitgreaves <i>v.</i> Bank.....	36		

TABLE OF CASES CITED

Southwest Co. v. Lamb.....	380	State v. McDuffie.....	27
v. Pac. Co.....	469	v. Omaha Bank... 2, 3, 191,	306
v. Plant.....	296	v. Richardson.....	53
Southwest F. Co. v. Standard..	296	v. Ry. Co.....	107
Soveran v. Yoran.....	303	v. Shevlin Co.....	460
Sowles v. Martin.....	309	v. Staed.....	5, 217
Spalding v. Black.....	345	v. Stevenson.....	74
Sparks v. Heritage.....	389	v. Sullivan.....	357
v. Hess.....	19	v. Thomas.....	525
v. Purdy.....	3, 4, 530	v. True.....	345
Sparta Bank v. Butts.....	357	v. Wilbur.....	356
Spaulding v. Baines.....	103	State Saving Assoc. v. Printing	
v. Jennings.....	532	Co.....	112
v. Preston.....	29, 393	State University v. Bank.....	351
Speak v. Ely Co.....	534	Steamship Co. v. Heron.....	111
Spence v. Mitchell.....	274, 278	Stearns v. Dean.....	453
Spencer v. Dearth.....	14	v. Houghton.....	272, 282
v. Morgan.....	438	v. Marsh... 33, 34, 58, 60,	286
v. Vance.....	341, 460	v. Vincent.....	448
Spicer v. Waters.....	23, 476, 477	Steele v. McGill.....	283
Spiney v. State.....	5	v. Marsicono.....	234
Spokane Co. v. Ex. Co.....	233	v. Schrieker.....	454
Spooner v. Holmes.....	4, 66, 186	v. Williams.....	319
v. Manchester.....	4, 5, 28	Steiner v. Tranam.....	446
Spoor v. Holland.....	464, 466	Steinhardt v. Bell.....	308, 394
Sprague v. McKenzie.....	529	Stephens v. Koonce.....	166, 535
Sprague Col. Agency v. Webb..	275	v. Meridian Co.....	292
Sprights v. Hawley.....	46, 175,	Stephenson v. Valentine.....	48
	176, 252	Sternberg v. Schein.....	247
Spreague v. Brown.....	508, 528	Stevens v. Bank.....	34
Springer v. Groom.....	241	v. Curran.....	242, 371
v. Jenkins... 366, 367, 401, 512,	528	v. Eames.....	64
St. John v. O'Connell.....	266	v. Gordon.....	437, 454
St. Louis v. Bissell.....	514	v. Stevens.....	238
St. Louis Co. v. Briggs.....	337	Stevenson v. Feezer.....	226
v. Egbert.....	341	v. Fitzgerald.....	316
v. Larned.....	86	Stewart v. Bright.....	482
v. McKinsey.....	536	v. Davis.....	27
v. Mundford.....	366	v. Fireman's Co.....	109
St. Peters Church v. Beach.....	484	v. Kearney.....	320
St. Romes v. Cotton P. Co.....	128	v. Kerney.....	311
Staat v. Evans.....	412, 414, 418	v. Long... 247, 357, 358,	374
Stafford v. Ames.....	21, 310, 324	v. Merchants Co.....	521
v. Long.....	522	v. Mills.....	389, 390
Stahl v. Dorman.....	192	v. Spedden.....	259, 534
Stallings v. Gilbreath.....	223	Stickney v. Allen... 30, 93, 374,	
Stanbach v. Rexford.....	386		456, 493, 519
Standard Co. v. Van Alstine....	316	Stiles v. Davis.....	96
Stanley v. City Co.....	511	Stilwell v. Farwell... 440, 476,	530
v. Davenport.....	133	Stinchfield v. Twaddle.....	364
v. Gaylord.....	181	Stirling v. Garritee.....	354, 364
v. Sierra N. Co.....	363	Stitt v. Lumber Co.....	325
Staples v. Smith.....	533	Stockbridge v. Crockett.....	316
Stark v. Wellman.....	380	Stockbridge Co. v. Iron Works..	495
Starnes v. Quinn.....	163, 283	Stodgel v. Fugate.....	313
Starr v. Winegar.....	203	Stokes v. Burney.....	154
State v. Bergner.....	54	v. Frazier.....	36
v. Berning.....	51, 68	Stollenwerck v. Thatcher... 85	
v. Fifield.....	53	Stone v. Clough.....	14
v. Hall.....	53	v. Marshall Co.....	511
v. Harriman.....	26	v. Oil Co.....	201
v. Hawkins.....	353	Storm v. Livingston.....	258, 271

TABLE OF CASES CITED

Storrs <i>v.</i> Robinson.....	530	Taft <i>v.</i> Ry. Co.....	109, 110
Stow <i>v.</i> Yarwood.....	529	Tallman <i>v.</i> Turck.....	211, 260
Strange <i>v.</i> Houston Co.....	108	Talty <i>v.</i> Freedman's Bank... 37, 56, 58, 60, 287	
Straw <i>v.</i> Jenks.....	472, 512	Tancil <i>v.</i> Cecil.....	318
<i>v.</i> Straw.....	19	<i>v.</i> Slaton.....	304
Strayhorn <i>v.</i> Giles.....	244	Tarp <i>v.</i> Gulseth.....	512
Street <i>v.</i> Nelson.....	294, 308, 448	Tarry <i>v.</i> Pering.....	309
<i>v.</i> Sinclair.....	513	Taum <i>v.</i> Kellogg.....	416
Strickland <i>v.</i> Barrett.....	70, 176, 222, 224, 292	Taylor <i>v.</i> Bowen.....	535
<i>v.</i> Parker.....	165, 166	<i>v.</i> Darling.....	349
<i>v.</i> Type F. Co.....	358	<i>v.</i> Harrall.....	230
Striker <i>v.</i> McMichael.....	445	<i>v.</i> Hawlon.....	239
Stromberg <i>v.</i> Lindberg.....	104, 105	<i>v.</i> Jones.....	345
Strong <i>v.</i> Adams.....	34, 289	<i>v.</i> Morgan.....	360
<i>v.</i> Banking Assoc.....	59	<i>v.</i> Plymouth.....	147, 148
<i>v.</i> Strong.....	469	<i>v.</i> Pope.....	47
Strubee <i>v.</i> Trustees.....	206, 504	<i>v.</i> Ryan.....	54, 195
Struss <i>v.</i> Schwab.....	210, 228, 237	Teall <i>v.</i> Felton.....	29
Struthers <i>v.</i> Peckham.....	12	<i>v.</i> Fenton.....	338
Stuart <i>v.</i> Alexander.....	101	Teass <i>v.</i> St. Albans.....	144
<i>v.</i> Bigler.....	57, 60, 62	Tebbetts <i>v.</i> No. C. Co.....	403
<i>v.</i> Phelps.....	207, 496, 503	Tebbs <i>v.</i> Cleveland Co.....	519
Studwell <i>v.</i> Shafter.....	188, 427	Tel. Co. <i>v.</i> Davenport.....	109, 110
Stull <i>v.</i> Howard.....	450	Telford Co. <i>v.</i> Gerhab.....	118
Stultz <i>v.</i> Dickey.....	22	Temple Co. <i>v.</i> Ins. Co.....	239
Sturges <i>v.</i> Keith.....	122, 150, 269, 366, 454, 534	Templeton <i>v.</i> Cloyston.....	381
Sturman <i>v.</i> Stone.....	357	Ten Eyck <i>v.</i> Harris.....	89
Sullivan <i>v.</i> Lamb.....	197	Ten Hopen <i>v.</i> Walker.....	27
<i>v.</i> Lawler.....	163	Tepple <i>v.</i> Dredge Co.....	269, 270
<i>v.</i> Royer.....	135	Terrell <i>v.</i> Butterfield.....	264
<i>v.</i> Sherry.....	283	<i>v.</i> McKinney.....	448
Summer <i>v.</i> Parish.....	410	Terry <i>v.</i> Bamberger.....	285
Summers <i>v.</i> Heard.....	465	<i>v.</i> Metevier.....	320
Sumner <i>v.</i> Cottage.....	182	<i>v.</i> Munger.....	397, 422, 426
<i>v.</i> Woods.....	181, 182	Terwilliger <i>v.</i> Wheeler.....	328
Sunnyside Co. <i>v.</i> Reitz.....	25	Tevis <i>v.</i> Ryan.....	517
Supervisor <i>v.</i> Decker.....	13	Texarkana Co. <i>v.</i> Kizer....	505, 506
Sup. T. Co. <i>v.</i> Stensland.....	397	Texas Co. <i>v.</i> Beard.....	282
Suroco <i>v.</i> Geary.....	146	<i>v.</i> Gay.....	353
Sutton <i>v.</i> Dana.....	460	Tex. Ry. Co. <i>v.</i> White.....	25
<i>v.</i> Green.....	537	Thayer <i>v.</i> Boston.....	140
<i>v.</i> McCoy.....	210	<i>v.</i> Dwight.....	288
<i>v.</i> Railway Co.....	278, 530, 534	<i>v.</i> Gile.....	168
Suydam <i>v.</i> Jenkins.....	486, 492	<i>v.</i> Hutchinson.....	327
Swann Co. <i>v.</i> Hall.....	203, 204	<i>v.</i> Kitchen.....	361
Swartout <i>v.</i> Evans.....	264, 534	<i>v.</i> Manley.....	403, 515, 536
Swartz <i>v.</i> Brewing Co.....	265	Thew <i>v.</i> Metter.....	469
Sweeney <i>v.</i> Lomme.....	469	Thielan <i>v.</i> Porter.....	144
Sweetland <i>v.</i> Stetson.....	322	Third Nat'l Bank <i>v.</i> Boyd....	482
Swenson <i>v.</i> Kleinschmidt.....	318	Thomas <i>v.</i> Grafton.....	196
Swift <i>v.</i> Mosely.....	68, 317, 322	Thomas Co. <i>v.</i> Hester.....	25
Swim <i>v.</i> Wilson.....	31, 47, 187	<i>v.</i> Moody.....	207, 215
Swinney <i>v.</i> Gouty.....	247	<i>v.</i> Morse.....	15
Swope <i>v.</i> Paul.....	320	<i>v.</i> Ramsey.....	386
Sword <i>v.</i> Young.....	91	<i>v.</i> Steele.....	455
Sylvester <i>v.</i> Craig.....	460	<i>v.</i> Sternheimer.....	211
Syndacker <i>v.</i> Brosse.....	196	<i>v.</i> Watt.....	397
		Thompson <i>v.</i> Andrews.....	534
		<i>v.</i> Carter.....	14, 225
		<i>v.</i> Gortner.....	15, 192
		<i>v.</i> Halbert.....	392

T

Taber <i>v.</i> Jenny.....	26
----------------------------	----

TABLE OF CASES CITED

Thompson v. Howard	429	Tucker v. Moreland	188
v. Iron Co.	349	v. Railway	97
v. Irwin	48	Tufts v. McClintock	53
v. Moesta	64, 533	Tuller v. Carter	464
v. Reeler	384	Tum Enden v. Jurgens	390
v. Rose	192, 228, 238, 274, 534	Turley v. Tucker	311
v. Toland	514, 536	Turnbull v. Widner	220
v. Vrooman	371	Turner v. Bank	368
v. Willard	340	v. Retter	470
Thornton v. Ry. Co.	22	v. Waldo	309, 393
Thorpe v. Burling	97, 322	Turnpike Co. v. Fry	513
v. Fowler	181	Turnstall v. Pollard	336
Thrall v. Lathrop	307, 460	Tuttle v. Campbell	165, 171, 421
Thurston v. Blanchard	192, 243, 418	v. Cone	320
Thweatt v. Stamps	18	v. Harding	5
Tiffany v. Lord	476	v. Jackson	300
Tightmeyer v. Mangold	425	v. White	22, 24, 504
Tilden v. Johnson	22, 33, 503	Tyler v. Taylor	156
Tillson v. Ewing	352	Tynburg v. Cohen	524
Tingley v. Parshall	266	Tyng v. Warehouse	482
Tinker v. Morrill	219, 233	Tyson v. Guineas	9, 336, 343
Tinkham v. Hayworth	13		
Tipton v. Burton	195, 333, 356	U	
Tissot v. Tel. Co.	144	Uhlin v. Cromack	27
Tiptombe v. Wood	212	Uncle Sam Oil Co. v. Forrester	517
Tobin v. Deal	3	Underhill v. Morgan	76
Toledo Ry. v. Chew	424	Underwood v. Lumber Co.	503
Tome v. Dubois	313	Union Bank v. Laird	117
Tools v. Americus	383	Union Co. v. Johnson	86
Toplitz v. Bauer	29, 522	Union, etc. Co. v. Tramble	381
Torian v. McClure	259	Union Nat'l Bank v. Roberts	33
Torp v. Gulseth	470	Union Pac. Co. v. Schiff	536
Torry v. Black	529	Union P. D. Co. v. Williams	477
Towle v. Lovet	17, 29, 311	Union Stock Yds. v. Mallory	246
v. Ward	513	v. Westcott	86, 87
Towne v. Elev. Co.	238, 481, 534	Union Trust Co. v. Rigdon	33, 57, 515
v. Harlam	516	United Coal Co. v. Canon City	
v. Hazen	236	C. Co.	346
v. Wiley	28, 67, 188	United Shoe Mach. Co. v. Holt	348
Traers v. Clews	352	United Soc. v. Underwood	536
Trammell v. McDode	178	University of N. C. v. Bk.	241
v. Russellville	134	Updegraff v. Lessem	341, 344, 348
Trawick Co. v. M. B. Co.	524	Usher v. Van Branken	287
Traylor v. Hughes	224, 234	U. S. Ex. Co. v. Keeper	79
Traynor v. Johnson	413, 460, 534	U. S. M. Co. v. Holt	476
Treat v. Barber	204	U. S. v. Williams	503
v. Gilmore	292, 513	v. Yukers	535
Tregent v. Maybee	430		
Tribble v. Laird	315	V	
Tripp v. Gronner	460	Vaden v. Ellis	388
Triscony v. Orr	358, 372, 373, 380	Vairin v. Hobson	30
Trompen v. Yates	346	Valentine v. Duff	259
Troup v. Smith	352	Vanardsdale v. Joiner	34, 39, 176, 472
Troxler v. Buckner	365		
Troy v. Clark	535	Van Brunk v. Schenck	325
Trubel v. Miller	324	Vance v. Towne	484
Trudo v. Anderson	259	Van Cleve v. Beach	14
Tubbs v. Richardson	160, 161	Van de Harr v. Van Domesler	383
Tucker v. Cole	151	Vandelle v. Rohan	13
v. Hamlin	476	Vanderburgh v. Bassett	316, 389, 438
v. Jewett	15, 417, 418		

TABLE OF CASES CITED

Vandiver v. O'Gorman.....	513
Van Doren v. Baltz.....	284
Van Duzor v. Allen.....	181
Van Houten v. Pye.....	325
Van Lessler v. Ann Arbor Co....	316
Van Liew v. Van Liew.....	200
Vansands v. Bk.....	113, 115
Vansandt v. Hobbs.....	15
Van Verden v. Winslow.....	471
Van Zandt v. Schuyler.....	321, 433
Varney v. Curtis.....	305
Vasse v. Smith.....	188, 427
Vaughn v. Thompson.....	291
v. Webster.....	460, 481
v. Wright.....	29, 490
Velsian v. Lewis. 3, 8, 48, 181,	252
Vermilye v. Ex. Co.....	14
Vickerson v. Cal. Stage Co.....	398
Vidovich v. Scott.....	439
Vilas v. Mason.....	20
Village of Des Plaines v. Poyer.	144
Vincent v. Cornell.....	315
Vining v. Baker.....	325
Virginia Timber Co. v. Glenwood	
Lbr. Co.....	372
Volney v. Gilman.....	102
Voltz v. Blackman.....	237
Vose v. Fla. Ry.....	515
Vrain v. Paine.....	342
Vroon v. Sage.....	15

W

Waddell v. Swann.....	264, 377
Wait v. Gilbert.....	80, 94
v. Kellogg.....	381
Walcott v. Keith.....	288, 534
Waldron v. Chicago Co.....	89
Walker v. Bank.....	213, 214
v. Bernent.....	517
v. Davis.....	427
v. Detroit.....	86
v. Fuller.....	456
v. Schindel.....	20, 460
v. Wetherbee.....	445, 534
Wallace v. City of Menasha ...	141
v. Finberg.....	525
Waller v. Bowling.....	167, 241,
262, 456, 460	
v. Waller.....	527
Walley v. Deseret Bk.....	34, 39, 60,
481, 490, 535	
Walling v. Lewis.....	535
v. Miller.....	224
Wallingford v. Kaiser.....	476, 478
Wallis v. Truesdale.....	194
Walrod v. Ball.....	513
Walsh v. Sichler.....	20
Walter v. Bennett.....	13
Waltham Co. v. N. Y. etc. Co..	521
Wamsley v. Atlas Co.....	532
Wanamaker v. Bowers.....	529

Ward v. Carson R. Co.. 22, 45, 256,	
454, 490, 498, 503	
v. Moffett.....	74, 268, 278, 530
v. Transfer Co.....	247
Warder, etc. Co. v. Harris.....	42
Ware v. Georgetown Soc.....	108
v. Percival.....	410, 429
Warne v. Rose.....	346
Warner v. Abbey.....	310
v. Allen.....	158
v. Carmack.....	427
v. Comstock.....	100
v. Dunnavan.....	260
v. Martin.....	284, 307
v. Mathews.....	514
v. Vallily.....	374
Warnick v. Baker.....	356, 368
Warren v. Dwyer.....	357
v. Landry.....	427
v. Smith.....	240
Warring v. Gaskill.....	35, 39
v. Pa. Ry. Co.....	261
Washburn v. Case.....	346
Washington Ice Co. v. Webster	
478, 525	
Water Lot Co. v. Leonard.....	525
Waters v. Stevenson.....	498
Watkins v. Bk.....	512
Watriss v. Pierce.....	367, 377
Watson v. Coburn.....	453
v. Harmon.....	537
v. Hoosac.....	344
v. Stever.....	416, 417, 419
v. Watson.....	195
Watt v. Potter..... 74, 266, 267,	484
Watts v. Green.....	181
v. Lehman.....	20
Waverly Co. v. St. L. Co.....	3,
191, 383	
Way v. Cutting.....	353
v. Davidson.....	288
Wear v. Gleason.....	223
Weatherby v. Covington.....	300,
301, 326	
Weaver v. Cryer.....	395
Webb v. Fox.....	315
v. Mann.....	164, 170
Webber v. Davis. 211, 213, 229,	244
v. Smerson.....	104
Weber v. Weber.....	45
Webster v. Drinkwater.....	411,
416, 420, 421	
v. Heylman.....	316
v. Moe.....	496
v. Neal.....	23
Weed v. Oliver..... 156, 178,	478
Weeks v. Hackett.....	282, 283
v. Prescott.....	525
Wehle v. Butter..... 347, 388,	394
v. Haviland.....	475, 523
Weidensaul v. Reynolds... 301,	451
Weightman v. Wash.....	147

TABLE OF CASES CITED

Weil v. Ponder.....	356	White v. Morton.....	284
Weiler v. Kershner.....	419	v. Osborn.....	157, 159
Weir v. Gleason.....	69	v. Phelps.....	226, 279
Weiser v. Zeisinger.....	17, 29	v. Ray.....	195
Weiserfeld v. McLean.....	532	v. Salisbury.....	482
Welch v. Clark.....	161, 178	v. Wall.....	284
v. Sackett.....	345, 346	v. Yawkey.....	3, 22, 436,
Weller v. Camp.....	28		437, 445, 503, 504
Welles v. Fish.....	353	White S. M. Co. v. Betting....	256
Wells v. Am. Ex. Co.....	80, 82	Whiteman Co. v. Tritle.....	256
v. Bannister.....	18	Whitfield v. Paris.....	138
v. Connable.....	291, 367	Whittingham v. Owens.....	455
v. Ragland.....	351	Whitlock v. Heard.....	211, 315
v. Thornton.....	70	Whitney v. Bonney.....	293
Welsh v. Mohr.....	28, 65	v. Huntington.....	22, 462
Wending Lbr. Co. v. Glenwood		v. Merchants Co.....	79
Lbr. Co.....	372	v. Peay.....	56
Wentworth v. Sawyer.....	297	v. Slanson.....	247, 272
Wernwag v. Phila. Ry.....	85	v. Stark.....	344
Wesoloski v. Stone.....	212	Whittaker v. Charleston....	34, 58
West Jer. Co. v. Car Co.....	191	v. Merrill.....	343
v. Trenton Co.....	211	Whittle v. Bailes.....	330
West v. White.....	469	Wicks v. Hatch.....	62
Westbay v. Gray.....	392	Wilbur v. Buckingham.....	475
Westbrook v. Eager.....	20	Wilcox v. Chicago Co.....	88
Western Co. v. Cleveland... 132, 137		Wilecox-Rose v. Evans.....	284
Western Land Co. v. Hall... 360,		Wilde v. Hexter.....	382, 527
	455, 527, 530	Wilder v. N. Y. Bk. Note Co... 388	
Western Min. Co. v. Quinn.... 378		Wiley v. Logan.....	264
Western N. Co. v. Wilhelm.... 525		v. Sinkler.....	340
Western Trans. Co. v. Barber 80, 82		Wilkinson v. Moseley.... 333, 371	
Western Union Co. v. Meyer... 91		Willard v. Giles.....	387
v. Reeves.....	528	v. Rice.....	209
Westheimer v. State Loan Co. 195		Williams v. Ashe..... 39, 56, 176	
Weston v. Carr..... 52, 238		v. Bramble.....	381
v. Higgins..... 438, 452		v. Brassell.....	369
Wetmore v. McDougall..... 429		v. Crum.....	528
Weyland v. A. T. & S. F. Ry.		v. Dean.....	527
Co..... 87, 92, 222		v. Dobson.....	101
Weymouth v. Chicago . 454, 496, 497		v. Fethers.....	216
Wheeler v. Aberdeen..... 144		v. Herndon... 300, 301, 326, 440	
v. Guild.....	32	v. Jarrot.....	448
v. Lawson.....	316	v. McKissack..... 379, 533	
v. Newbound... 33, 34, 35, 287		v. Merle..... 47, 175, 181, 211	
v. Pereles..... 59, 464, 471, 522		v. Miller.....	52
v. Train.....	436	v. Nolen.....	156
v. Whalen.....	158	v. Raper.....	102
Wheelock v. Wheelwright..... 64		v. Rogers.....	419
Whelden v. Chappel..... 28, 71		v. Smith.....	278
Whidden v. Seelye..... 9, 20, 336		v. State.....	302
Whipple v. Dutton..... 471		v. Stowell..... 373, 377	
v. Gilpatrick..... 256		v. Wall..... 15, 45	
Whitaker v. Houghton..... 456		v. Wood.....	523
White v. Allen..... 464		Williamson v. Howell..... 341	
v. Balankenbeckler..... 8		v. Russell..... 212, 296	
v. Brooks..... 413, 414		v. Sammons.....	313
v. Charleston.....	147	Willis v. Barrister..... 227	
v. Demary..... 270, 347, 348		v. Bk.....	292
v. Dinkins.....	441	v. Holmes.....	455
v. Hall.....	348	v. Snelling.....	438
v. Kelly.....	490	Willoughby v. Moulton.... 212	
v. Martin.....	481	Wilmer v. Pelliman... 163, 168, 225	

TABLE OF CASES CITED

Wilson v. Adams Ex. Co.	90	Work v. Bennett.	39, 60
v. Hoffman.	316, 325	Worley v. Columbia.	132, 134
v. Little.	37, 57	Worsham v. Vignal.	212, 383
v. McLaughlin.	4	Worth v. Buck.	456
v. Reed.	166	Worthington v. Forney.	62
v. Rucker.	17	v. Hanna.	102
v. Stewart.	309	Wright v. Bk.	58, 489
Winburne v. Bryan.	509	v. Elwood.	199
Wincher v. Shrewsbury.	312	v. Guier.	324
Winchester v. Craig.	501	v. Lepper.	300
Winder v. Bk.	382	v. Skinner.	203, 204, 460
Windham v. Stephenson.	22	v. Solomon.	178
Wing v. Milliken.	22, 24, 167,	v. Starks.	292, 435, 464
170, 460, 468, 478, 495,	500	v. Sullivan.	306
Wingate v. Smith.	209	v. Ward.	349
Winlack v. Geest.	388	Wurmser v. Frederick.	196
Winslip v. Neal.	328	Wyckoff v. Anthony.	346
Winslow v. The Vermont Road		v. Bodine.	470
	89, 91	Wygal v. Bigelow.	103, 198
v. Wilmington Co.	520	Wykoff v. Stevenson.	275
Winstead v. Hicks.	460, 505	Wyly v. Grigsby.	17
Witcher v. Brewer.	152	Wyman v. Am. Co.	484, 517
Withers v. La Fayette Co.	5, 17	v. Bowman.	210
Witherspoon v. Blewett.	239	Wymouth v. Chicago, etc. Co.	
Wolf v. Mo. Pac. Ry. Co.	222		24, 207
v. Shepherd.	316		
Womble v. Leach.	531		
Wood v. Cohen.	259		
v. Harrington.	440		
v. Mathews.	33, 515		
v. McKean.	14		
v. Pierson.	278, 302, 305		
v. Weiman.	292		
Woodbury v. Long.	53, 240, 250		
Wooden Ware Co. v. U. S.	481, 504		
Woodham v. Cline.	370		
Woodis v. Jordan.	215		
Woodman v. Hubbard 2, 28, 73,	188		
Woodruff v. Painter.	75		
Woodruff, etc. Co. v. Adams.	19		
Woods v. Ayres.	410		
v. McCall.	20		
v. Nichols.	183, 516		
Woods Mach. Co. v. Woodcock			
	384, 456		
Woodworth v. Garsline.	505		
v. Hascall.	29, 522		
Wooley v. Campbell.	204		
v. Carter.	23, 456, 498,		
Wooster v. Sherwood.	268		
Wooten v. Wilmington.	127		
Wootiers v. Kauffman.	284		
Worcester Bk. v. Dorchester			
Bk.	32, 186		
Worden v. New Bedford.	138		
v. Witt.	54		

Yale v. Saunders.	76, 276
Yamhill B. Co. v. Newby. .	163, 168
Yancy v. Stone.	382
Yardurn v. Wolf.	333
Yater v. Mullen.	460, 478
Yates v. Milwaukee.	142
Yeager v. Wallace.	239
Yeldell v. Barnes.	101
v. Shinholster.	77
Yore v. Murphy.	341, 351
Yost v. Stout.	223
Young v. East, etc. Co.	84
v. Glasscock.	386
v. Lewis.	271, 288
v. Moore.	55, 195

Zachary v. Pace.	75, 216, 276
Zarn v. Livesay, et al.	397
Zimmerman v. Bk.	245, 250
Zimpleman v. Veeder.	33
Zindorf v. West Am. Co.	462,
	478, 481
Zinn v. Rice.	524
Zorn v. Lafferty.	405
Zuchtmann v. Roberts.	182
Zunkle v. Cunningham.	320

A TREATISE ON THE LAW OF CONVERSION

CHAPTER I

WHAT IS CONVERSION?

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| § 1. Definition. | § 6. Same subject; when intent immaterial. |
| § 2. Ingredients of a conversion. | § 7. What interference necessary in a conversion. |
| § 3. Whether use of chattels a conversion. | § 8. Intent may affect measure of damages. |
| § 4. How far wrongful intent essential. | § 9. A conversion deprives owner of his property. |
| § 5. Same subject; good intentions sometimes excuse defendant. | § 10. Interference must be wrongful. |

§ 1. **Definition.** — Words of the same import have been used in various combinations to define conversion. It has been said that any distinct act of dominion wrongfully exerted over one's property in denial of his right, or inconsistent with it, is a conversion.¹ This short definition is correct, accompanied by the explanation subsequently given it by its author, but by itself lacks some of the elements necessary to clearly identify the term. Conversion is elsewhere said to be an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights.² And the same author, constructing a definition from extracts from several decisions, says that every such unauthorized taking of personal property, and all intermeddling with it beyond the extent of the authority conferred, in case a limited authority over it has been given,

¹ Cooley, Torts, 524.

² Bouvier's L. Dict., "Conversion"; 38 Cyc. 2005.

with intent so to apply or dispose of it as to alter its condition or interfere with the owner's dominion, constitutes a conversion.¹ Again, conversion is a wrong consisting in dealing with the property of another as if it were one's own, without authority.² And conversion is any wrongful exercise or assumption of authority personally or by procurement over another's goods, depriving him of their possession.³ And it is said that it may be stated as a general rule that every act of control or dominion over personal property without the owner's authority and in disregard and violation of his rights is, in contemplation of law, a conversion.⁴ And perhaps a more specific definition is contained in the statement that conversion of personal property takes place wherever a person who is neither the owner nor entitled to the possession exercises dominion or control over it inconsistent with or in defiance of the rights of a person who is either in possession or entitled to the immediate possession.⁵

§ 2. **Ingredients of a Conversion.** — It will thus be seen that conversion is an offense against the possession, and, therefore, it cannot be committed against one who is neither in possession nor entitled to the immediate possession.⁶ And, although it is not necessary that there be an actual manual taking of personal property to constitute a conversion,⁷ there must be such active interference with the owner's right of property or control as will deprive him of its free use and enjoyment.⁸ Nor is it necessary that the property be applied to the use of the defendant, nor even of a third person.⁹ The element of controlling influence is the owner's loss and not the wrongdoer's benefit. As has been said: "In order to constitute a conversion, there must be an intention of the defendant to take to himself the property in the goods, or to deprive the plaintiff of it. If the entire article is destroyed, as, for instance, by burning it, that would be a taking of the property from the plaintiff and depriving him of it, although the

¹ Bouvier's L. Dict., "Conversion"; 38 Cyc. 2005.

² Abbott's L. Dict., "Conversion."

³ *Hale v. Ames*, 2 T. B. Mon. 143, 15 A. D. 150.

⁴ 28 Am. & Eng. Enc. of Law, 679.

⁵ *Fuller v. Tabor*, 39 Me. 519; *Liptrot v. Holmes*, 1 Ga. 381; *Woodman v. Hubbard*, 25 N. H. 67, 57 A. D. 310; *Goell v. Smith*, 128 Mass. 238; and numerous other cases cited in note to *Bolling v. Kirby*, 24 A. S. R. 795.

⁶ *Middesworth v. Sedgwick*, 10 Cal. 392; *Swift v. Moseley*, 10 Vt. 208, 33 A. D. 197.

⁷ *Connah v. Hale*, 23 Wend. 462; *Hale v. Ames*, 2 T. B. Mon. 143, 15 A. D. 150; *Bristol v. Burt*, 7 Johns. 254, 5 A. D. 264.

⁸ *Bowlin v. Nye*, 10 Cush. 416.

⁹ *Bristol v. Burt*, *supra*; *Banner v. Schlesinger*, 109 Mich. 262, 67 N. W. 116; *State v. Omaha Nat'l. Bank*, 59 Neb. 483, 93 N. W. 319; *McPheters v. Page*, 83 Me. 234, 22 Atl. 101, 23 A. S. R. 772; *Baker v. Beers*, 64 N. H. 102.

defendant might not be considered as appropriating it to his own use."¹

§ 3. **Whether Use of Chattels a Conversion.** — But the use, disposition or detention of property by a defendant might be a conversion under certain circumstances but not under others; as, for example, if the use, disposition or detention was to do a kindness to the owner, and without any intention of injury to the thing, or to convert it to the use of the person using, disposing of or detaining it, and was merely conservative of it and perfectly consistent with the rights of the owner and his dominion over it, it is held that no conversion occurs.²

§ 4. **How Far Wrongful Intent Essential.** — It is a general rule that the intent with which a defendant has acted is immaterial in determining whether he is guilty of a conversion.³ And though it be made to appear that the intention of a wrongdoer is not to claim any right of property in chattels, or to the possession thereof, or to obtain any benefit from them, he may become answerable for converting them if he abuse them, or by his unlawful and unauthorized dominion over them occasion them to be lost to the owner.⁴ Or, as has been said, the intent with which the wrongful act was done is not an essential element of the conversion, but it is enough that the true owner has been deprived of his property by the unauthorized act of some one who assumes dominion or control over it.⁵ Even in cases of an honest mistake as to existing facts where a wrongful motive could not be imputed to the defendant, he has nevertheless been held liable for a conversion if he has exercised dominion or control over the plaintiff's property to the exclusion of the latter's rights.⁶ Thus, in one instance it was shown that the

¹ *Simmons v. Lillystone*, 8 Exch. 431.

² *Greenleaf v. 643*; *Conner v. Allen*, 33 Ala. 516; *Sparks v. Purdy*, 11 Mo. 219.

³ *Harker v. Dement*, 9 Gill. 7, 52 A. D. 670; *State v. Omaha Nat'l. Bank*, 59 Neb. 483, 93 N. W. 319; *Fitzgerald v. Burrill*, 106 Mass. 406; *Kenney v. Ranney*, 96 Mich. 617, 55 N. W. 982; *Fawcett v. Osborn*, 32 Ill. 411, 83 A. D. 278; *Waverly, etc. Co. v. St. Louis, etc. Co.*, 112 Mo. 383, 20 S. W. 566; *Rakestraw v. Floyd*, 54 S. C. 288, 32 S. E. 419.

⁴ *Tobin v. Deal*, 60 Wis. 87, 18 N. W. 634, 50 A. R. 345; *Gilson v. Fisk*, 8 N. H. 404; *Knour v. Wagoner*, 16 Ind. 414.

⁵ *Velsian v. Lewis*, 15 Ore. 539, 16 Pac. 631, 3 A. S. R. 184; citing *Edwards on Bailments*, 162. *Cooley, Torts*, 534, 538, 688; *Flanders v. Colby*, 28 N. H. 34; *Boyce v. Brockway*, 31 N. Y. 490; *Morrill v. Moulton*, 40 Vt. 242; *Baltimore Ry. Co. v. O'Donnell*, 49 Ohio St. 489, 32 N. E. 476, 34 A. S. R. 579, 21 L. R. A. 117.

⁶ *White v. Yawkey*, 108 Ala. 270, 19 So. 360, 54 A. S. R. 159; *Forsyth v. Wells*, 41 Pa. St. 291, 80 A. D. 617; *Murphy v. Hobbs*, 8 Col. 17, 5 Pac. 637; *Edwards v. Express Co.*, 121 Ia. 744, 96 N. W. 740, 63 L. R. A. 467; *Donohue v. Shippee*, 15 R. I. 453, 8 Atl. 541; *Coykendall v. Eaton*, 55 Barb. 188, 37 How. Pr. 438; *contra: Richardson v. Stevens*, 6 N. Y. Supp. 361.

plaintiff delivered a letter to the defendant, a clerk in the post-office, to be sent by mail as a registered letter, under a mutual mistaken belief that a registered letter could be sent to the place to which the one in question was addressed. On discovering the mistake, the defendant sent it through the mail unregistered, and it was lost. It was held that the defendant was answerable as for a conversion.¹

§ 5. Same Subject; Good Intentions Sometimes Excuse Defendant. — It is true, however, that there are some cases in which the defendant has been absolved from liability on the grounds of the absence of a wrongful intent where he has interfered somewhat with the chattels of the plaintiff but they were not sold, lost or destroyed, nor otherwise appropriated to the use of the wrong-doer.² But in all such instances it will be observed that the innocence of the defendant was sustained on the ground that his act was justified by some kind of authorization from the plaintiff.³ The reason of the general rule is that it is the effect of the act which constitutes the conversion, and not the circumstances leading up to it nor the motive impelling it.⁴ The primary as well as the ultimate fact to be determined is, has the defendant, without rightful authority, interfered with the chattels of the plaintiff so as to hinder the latter in the full and free use, enjoyment and possession of them? If this fact exist, then the defendant is guilty of a conversion however laudable his motives may have been.

§ 6. Same Subject; When Intent Immaterial. — Somewhat contrary to this, however, the proposition has been espoused that if a person wrongfully exercises acts of ownership or dominion over property under a mistaken view of his rights, the tort, notwithstanding his mistake, may still be a conversion, because he has both claimed and exercised over it the rights of an owner; but whether an act involving the temporary use, control or detention of property implies an assertion of a right of dominion over it may well depend upon the circumstances of the case and the intention of the person dealing with the property.⁵ But I think such holding somewhat too favor-

¹ *Fitzgerald v. Burrill*, 106 Mass. 406.

² *Mattice v. Brinkman*, 74 Mich. 705, 42 N. W. 172; *Farnsworth v. Lowery*, 134 Mass. 512; *Sparks v. Purdy*, 11 Mo. 219; *Aldrich v. Wright*, 53 N. H. 398, 16 A. R. 339.

³ See *Hills v. Snell*, 104 Mass. 173, 6 A. R. 216.

⁴ *Gibbons v. Farwell*, 63 Mich. 344, 29 N. W. 855, 6 A. S. R. 301; *Laverty v. Snethen*, 68 N. Y. 522, 23 A. R. 184.

⁵ *Nelson v. Merriam*, 4 Pick. 249; *Spooner v. Holmes*, 102 Mass. 503, 3 A. R. 491; *Wilson v. McLaughlin*, 107 Mass. 587; *Fouldes v. Willoughby*, 8 M. & W. 540; cited in *Spooner v. Manchester*, 133 Mass. 270, 43 A. R. 514.

able to the defendants, and that if one of two innocent persons must suffer it should be he whose act is the *causa proxima*. As was said by one court, it may seem to be hard to be held for a wrong when no wrong was intended, but it is no harder than for the plaintiff, without fault on his part, to lose his property.¹

§ 7. **What Interference Necessary in a Conversion.** — But it is held that it is not every tortious act having reference to another's property that will amount to a conversion, it even being said that acts which do not in themselves imply an assumption of title or right of dominion over such property do not amount to a conversion unless done with the intention to deprive the owner of it temporarily or permanently.² And it has also been held that even though the defendant has interfered with the property of the plaintiff, such act will not amount to a conversion unless the owner has been deprived of possession,³ or his dominion or title repudiated or denied.⁴

§ 8. **Intent May Affect Measure of Damages.** — Whatever consideration may be given to the matter of the intention as an element in the proof of conversion, that will not infringe upon the rule to which the authorities seem to adhere that, the conversion once proved, the intention of the wrong-doer may become important as bearing upon the measure of recovery against him. In cases where the act constituting the conversion was willful and malicious, or was committed under such vexatious circumstances as to manifest a total disregard of the rights of the owner of the property, the intent may be considered as grounds for allowing to the plaintiff exemplary or punitive damages.⁵

§ 9. **A Conversion Deprives Owner of his Property.** — As was said above, the essence of a conversion is not the actual taking of the owner's property⁶ (or "manucaption" as it is technically called), nor the carrying it away⁷ (or "asportation" as it is technically

¹ *Mohr v. Langan*, 162 Mo. 474, 63 S. W. 409, 85 A. S. R. 503, and numerous Missouri cases there digested.

² *Spooner v. Manchester*, 133 Mass. 270, 43 A. R. 514.

³ *Boobier v. Boobier*, 39 Me. 406.

⁴ *State v. Staed*, 72 Mo. App., 581; *Frome v. Dennis*, 45 N. J. L. 515.

⁵ *Bates v. Vallender*, 3 N. D. 256, 16 N. W. 506; *Backenstrass v. Stahler*, 33 Pa. St. 251, 75 A. D. 592; *Downing v. Outerbridge*, 79 Fed. 931, 25 C. C. A. 244; *Bahr v. Boley*, 50 N. Y. App. Div. 577, 64 N. Y. Supp. 200; *Reamer v. Express Co.*, 93 Mo. App. 501, 67 S. W. 718; and see *post*, chapter on Measure of Damages.

⁶ *Budd v. Railway Co.*, 12 Ore. 271, 7 Pac. 99, 53 A. R. 355; *Withers v. LaFayette Co. Bank*, 67 Mo. App. 115; *Brown v. Campbell Co.*, 44 Kan. 237, 24 Pac. 492, 21 A. S. R. 274; *Bolling v. Kirby*, 90 Ala. 215, 7 So. 914, 24 A. S. R. 789, and note; *Tuttle v. Hardenburg*, 15 Mont. 219, 38 Pac. 1070; *Cernahan v. Chrisler*, 107 Wis. 645, 83 N. W. 778.

⁷ *Spiney v. State*, 26 Ala. 90; *Meyer v. Doherty*, 133 Wis. 398, 113 N. W. 671, 126 A. S. R. 967, 13 L. R. A. (N. S.) 247.

called); but the essential element is the wrongfully depriving the owner of its use and possession.¹ But conversion does not necessarily imply a complete and absolute deprivation of property; there may be a deprivation which is only partial or temporary, or the property may remain in the plaintiff or be restored to him. An illustration is where one hires a horse for one use and puts it to another, subsequently returning it to the owner.²

§ 10. **Interference Must be Wrongful.** — It will be noted that the deprivation must be wrongful, for without the element of wrong no tort can be committed and conversion cannot occur; and to be wrongful, it must be wholly without the owner's sanction or assent, either express or implied.³ So, where the owner has given to another, or permitted him to have control of the property, no one can be held responsible in tort for its conversion who merely makes such use of the property or exercises such dominion over it as is warranted by the authority thus given.⁴ Otherwise expressed, it has been said that a rightful interference with the chattels of another cannot constitute a conversion.⁵

¹ *Simmons v. Sikes*, 24 N. C. 98; *Evans v. Mason*, 64 N. H. 98, 5 Atl. 766.

² *Daggett v. Davis*, 53 Mich. 35, 18 N. W. 548, 51 A. R. 91, and cases cited.

³ *Mann v. Lamb*, 83 Minn. 14, 85 N. W. 827; *Haynes v. Kettenbach*, 11 Idaho 73, 81 Pac. 114; *Robinson v. Hartridge*, 13 Fla. 501; *Machine Co. v. Woodcock*, 43 Wash. 317, 86 Pac. 570; *Martin v. Megargee*, 212 Pa. St. 558, 61 Atl. 1023.

⁴ *Hills v. Snell*, 104 Mass. 173, 6 A. R. 216, and cases cited; *Powers v. Klenzie*, 15 Mont. 177, 38 Pac. 833; *Downer v. Rowell*, 24 Vt. 343.

⁵ *Barret v. Mobile*, 129 Ala. 179, 30 So. 36.

CHAPTER II

WHAT IS TROVER?

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| § 11. Is form of action to recover damages for conversion. | § 13. Similar to detinue. |
| § 12. How different from trespass. | § 14. How different from replevin. |
| | § 15. Action is transitory. |

§ 11. **Is Form of Action to Recover Damages for Conversion.** — Trover is a remedy to recover the value of personal property from one who has wrongfully converted it to his own use. Or, otherwise said, it is a form of action which lies to recover damages against one who has, without right, converted to his own use goods or personal chattels in which the plaintiff has a general or special property.¹ The action of trover was, in its origin, an action of trespass on the case for the recovery of damages against one who had found goods and refused to deliver them on demand of the owner, but converted them to his own use, from which word, finding, the action or remedy is called trover. By a fiction of law, actions of trover were at length permitted to be brought against any person who had in his possession, by any means whatever, the personal property of another and sold or used the same without the consent of the owner, or refused to deliver the same when demanded. The injury lies in the conversion and deprivation of the plaintiff's property, which is the gist of the action, and the statement of the finding is now immaterial and not traversable; and the fact of conversion does not necessarily imply an acquisition of property in the defendant. It is an action to recover damages to the extent of the value of the thing converted. The object and the result of the suit are not the recovery of the thing itself, which can only be recovered in an action of detinue or replevin.² As a remedy, trover is legal as distinguished from equi-

¹ Bouvier's L. Dict., Title "Trover."

² 1 Chitty, Pleading (14th Am. ed.) quoted in *Burnham v. Pidcock*, 66 N. Y. Supp. 806; 38 Cyc. 2007.

table,¹ although it is said that the action is equitable in its nature,² but unavailable to enforce equitable rights.³

§ 12. **How Different from Trespass.** — The action of trover is closely allied to the action of trespass. But there are two principal differences between these actions. The first difference is that in trespass there is always either an original wrongful taking or a taking made wrongful *ab initio* by subsequent misconduct; while in trover the original taking is supposed or assumed to be lawful, and often the only wrong consists in a refusal to surrender a possession which was originally rightful, but the right to which has been terminated. The second difference is that trespass lies for any wrongful interference by force, but the wrongful force is no conversion where it is employed in recognition of the owner's right and with no purpose to deprive him of his right temporarily or permanently.⁴

§ 13. **Similar to Detinue.** — And the action of trover has many of the elements of, and perhaps is an outgrowth of the old action of detinue which has now practically passed out of use. The action of detinue was for the recovery, in specie, of personal chattels from one who had acquired possession of them lawfully but retained it without right, together with damages for the detention.⁵ It is said that in detinue the possession and detention constituted the gist of the action; in trover, the conversion.⁶

§ 14. **How Different from Replevin.** — The action differs from replevin in that the latter is brought for the recovery of chattels in specie which have been unlawfully taken or detained, or, in some states by virtue of statute, for their value in case they cannot be had; while in trover the action is for damages for the conversion of the property. It has been held that trover and replevin are concurrent remedies in favor of plaintiff when defendant's taking of plaintiff's property was wrongful,⁷ and that any act amounting to a conversion in trover will constitute a wrongful detention in replevin.⁸

§ 15. **Action is Transitory.** — In most of the states forms of action have been abolished, and all forms of remedies for the redress of civil wrongs are denominated civil actions. But regardless of this

¹ *Alter v. Bank*, 51 Neb. 797, 71 N. W. 715; *Fulton v. Fulton*, 48 Barb. 581.

² *Fields v. Brice*, 108 Ala. 632, 18 So. 742.

³ *Cooper v. Davis*, 15 Conn. 556; *White v. Balankenbeckler*, 115 Mo. App. 722, 92 S. W. 503; *Draper v. Walker*, 98 Ala. 310, 13 So. 595.

⁴ *Cooley*, Torts, 517; see *Montgomery Co. v. Chapman*, 126 Fed. 68, 61 C. C. A. 124; *Bever v. Swecker*, 138 Ia. 721, 116 N. W. 704.

⁵ 3 Blackstone Com. 151.

⁶ *Hall v. Amos*, 5 T. B. Mon. 89, 17 A. D. 42; see *Porter v. Miller*, 7 Tex. 475.

⁷ *Velsian v. Lewis*, 15 Ore. 539, 16 Pac. 631, 3 A. S. R. 184.

⁸ *Oleson v. Merrill*, 20 Wis. 462, 91 A. D. 428.

abolition, the substantial elements of trover are the same as formerly. The plaintiff must prove an unlawful conversion of his chattels by the defendant, and without such proof his action must fail.¹ The action of trover is transitory in its nature and its venue is not restricted to the jurisdiction where the conversion occurred, unless made so by statutory enactment.²

¹ *Omaha, etc. Co. v. Tabor*, 13 Colo. 41, 21 Pac. 925, 16 A. S. R. 185; *Payne v. Elliott*, 54 Cal. 339, 35 A. R. 80.

² *Whidden v. Seelye*, 40 Me. 247, 63 A. D. 661; *Tyson v. McGuineas*, 25 Wis. 656; *Floyd v. Gibbs*, Tex. Civ. App., 34 S. W. 154; *Bird v. Ga. Ry. Co.*, 72 Ga. 655.

CHAPTER III

WHAT MAY BE CONVERTED

1. MONEY

- § 16. When trover may be maintained for money.
- § 17. Same subject.
- § 18. When specific money cannot be identified.

2. BILLS AND NOTES

- § 19. How may be converted.
- § 20. Where consideration of note illegal.

3. SHARES OF STOCK

- § 21. Difference between conversion of shares and certificate.
- § 22. How conversion of stock may occur.

4. MUNIMENTS OF TITLE

- § 23. What are, and whether may be converted.

5. JUDGMENTS AND RECORDS

- § 24. Not subject to conversion.

6. BUILDINGS

- § 25. If personal property, may be converted.

7. FIXTURES

- § 26. May be converted if not part of realty.
- § 27. Agreement of parties determines character.

8. CROPS

- § 28. May be converted if personality.
- § 29. Wrongful removal a conversion.
- § 30. Whether purchase of, a conversion.

9. TIMBER

- § 31. Cannot be converted till severed.
- § 32. Question as to measure of damages.

10. ROCK, GRAVEL AND ORE

- § 33. Are not subject to conversion till severed from soil.
- § 34. Same subject.

11. ANIMALS

- § 35. Domestic and reclaimed wild animals may be converted.
- § 36. Conversion of hired animals.
- § 37. Liability of minors for conversion of horses.

12. MISCELLANEOUS CHATTELS

- § 38. When subjects of conversion.

13. STOLEN PROPERTY

- § 39. Trover may ordinarily be maintained for.
- § 40. Owner may sue thief or the person in possession.

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| <p>§ 41. Trover not maintainable for stolen money or negotiable instruments.</p> <p>§ 42. Whether necessary to first prosecute thief.</p> <p>14. COLLATERAL SECURITY AND PLEDGED PROPERTY</p> <p>§ 43. Duty of pledgee to protect.</p> <p>§ 44. Acts by pledgee amounting to conversion.</p> <p>§ 45. Sale by pledgee without notice.</p> | <p>§ 46. Sale by pledgee must be public.</p> <p>§ 47. Pledgee cannot buy at his own sale.</p> <p>§ 48. What does not amount to a conversion by pledgee.</p> <p>§ 49. Acts or conduct of pledgor may amount to waiver of the conversion.</p> <p>§ 50. When pledgor must tender payment and demand the property prior to trover.</p> <p>§ 51. What acts by third parties amount to conversion.</p> |
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1. MONEY

§ 16. **When Trover may be Maintained for Money.** — Trover lies for the conversion of money where there is an obligation on the part of the defendant to return specific coin or notes intrusted to his care. So the action will lie for money received by the defendant and not paid over as requested, or for money paid by mistake to the wrong party where the money can be identified, as specie on special deposit, or bank bills on proof of their denomination. And bank bills deposited in pledge may be recovered in this form of action; and the rights of plaintiff are not prejudiced by the fact that the subject-matter of the action is money, since the same principles are to govern as if the articles deposited had been a watch, a jewel or other articles of personal property.¹ It is otherwise said to be a general rule that although an obligation to pay money is ordinarily enforceable by assumpsit or debt, yet trover lies for the conversion of "ear-marked" money, or specific money capable of identification, or coins or notes that have been intrusted to the defendant's care.²

§ 17. **Same Subject.** — If the plaintiff has delivered to the defendant a sum of money to be applied to a special payment, and the defendant fails to so apply it, but converts it to his own use, he will be held liable in trover.³ And a servant is likewise liable for money

¹ 26 Am. & Eng. Enc. L. 767.

² 21 Enc. Pl. & Pr. 1020. In one case coming under my observation, two boys were employed to clean out and remove dirt and debris from an old hen-house standing on premises owned and occupied by defendants. While so engaged they dug up an old rusty vessel containing gold coins of the value of \$7000. Upon showing the vessel and coins to the defendants, the latter made claim to it as being the owners, and, on demand, refused to give up the money. The boys had not counted the coins and had no means of identifying them; but in an action of trover for their conversion, it was held that defendants would be liable unless they could prove their ownership of the money: *Danielson v. Roberts*, 44 Ore. 108, 74 Pac. 913, 102 A. S. R. 627.

³ *Bunger v. Roddy*, 70 Ind. 26; *Farrand v. Hurlburt*, 7 Minn. 477; *Graves v. Dudley*, 20 N. Y. 76.

received for his master but converted to his own use.¹ The same was held true where the money was in such form or so arranged as to be capable of identification and was left with the defendant for safe keeping;² as where it was rolled up in a canvas bag and placed in the defendant's safe.³ So, where money was deposited in a bank as a special deposit the bank was held liable for a conversion where it mingled the money with its own and treated the special deposit as a general one.⁴ And the same conclusion was reached in a case where the plaintiff had left a package of money in the safe of one who later died and whose administrator mingled the money with other funds.⁵ Plaintiff's complaint alleged that the defendant assaulted her and took from her a certain sum of money by force. Her action was one of trover for the conversion of the money. The evidence disclosed the fact that at the time the plaintiff was indebted to the defendant. The court held the defendant liable, saying that a man has no right to resort to robbery to collect his claims.⁶ So, it is generally held that trover will lie for money of which the defendant has obtained the possession by robbery, if it can be identified.⁷

§ 18. When Specific Money cannot be Identified. — But the requirement of the identification of the money sued for in trover has in some instances been dispensed with. For instance, it is held that where money has come into the defendant's possession which the plaintiff is entitled to receive in specie, the defendant will be liable for its conversion even where he has mingled it with his own and its identification is thereby made impossible.⁸ The feature of such holding is the fact that the plaintiff is entitled to have the identical money collected or received by the defendant turned over to him.⁹ The general rule is that unless the plaintiff is entitled to have the identical money turned over to him, he cannot hold the defendant

¹ *Royce v. Oakes*, 20 R. I. 252, 38 Atl. 371; second hearing 20 R. I. 418, 39 Atl. 758; *Donohue v. Henry*, 4 E. D. Smith, 162. In this latter case, however, it was held that the action could not be maintained where the money had with the plaintiff's consent gone into the defendant's possession and had been mingled with his own funds. See *Crosby v. Clark*, 80 Hun 426, 30 N. Y. Supp. 329.

² *Jones v. Hunt*, 74 Tex. 647, 12 S. W. 832; *Royce v. Oakes*, *supra*.

³ *Struthers v. Peckham*, 22 R. I. 8, 45 Atl. 742. It is said, however, that it is not necessary that the money for which the action is brought should have been confined in a bag or pouch: 28 Am. & Eng. Enc. L. 653 and citations.

⁴ *Coffin v. Anderson*, 4 Blackf. 395 (Ind.); *First Nat'l. Bank v. Dunbar*, 118 Ill. 625, 9 N. E. 186.

⁵ *Hunnicut v. Higginbotham*, 138 Ala. 472, 35 So. 469, 100 A. S. R. 45; *Meyer v. Doherty*, 133 Wis. 398, 113 N. W. 671, 126 A. S. R. 969, 13 L. R. A. (N. S.) 247.

⁶ *Murphy v. Virgin*, 47 Neb. 692, 66 N. W. 652.

⁷ *Benson v. Eli*, 16 Col. App. 494, 66 Pac. 450.

⁸ *Salem Co. v. Anson*, 41 Ore. 562, 67 Pac. 1015, 69 Pac. 675.

⁹ *Farrelly v. Hubbard*, 148 N. Y. 592, 43 N. E. 65; *Donohue v. Henry*, 4 E. D. Smith 162; *Schanz v. Martin*, 37 Misc. 492, 75 N. Y. Supp. 997.

for its conversion even where the latter has received it in a fiduciary capacity.¹ Thus, it has been held that trover will not lie by a state manager of an insurance company who has appointed an agent to secure applications and collect premiums, to recover a premium which the agent has collected and which he refuses to turn over, where the contract does not require him to keep the money intact, and he is entitled to commissions on money collected and paid over.² The foundation of this holding is the fact that the defendant had a right to commissions out of the money collected. The same distinction was made in another case, but with a different result, where it was held that a banker could not be held for a conversion of money collected by him in that capacity. In this case the court took occasion to remark that if the defendant had been attorney instead of banker for the defendant, he would have been liable.³ And it has very generally been held that where an attorney collects money for his client and converts it to his own use he may be held in trover for its conversion,⁴ even where he has mingled it with money of his own.⁵ Other holdings in reference to the conversion of money will be found in the notes;⁶ but it may be here stated as a general rule that trover will not lie upon a plain obligation of indebtedness where there is no duty to return specific money.⁷

2. BILLS AND NOTES

§ 19. **How may be Converted.** — Trover is maintainable against a defendant who has converted a bill of exchange,⁸ check,⁹ or promis-

¹ *Rothchild v. Schwarz*, 28 Misc. 521, 59 N. Y. Supp. 527; *Vandelle v. Rohan*, 36 Misc. 239, 73 N. Y. Supp. 285; *Royce v. Oakes*, 20 R. I. 148, 39 Atl. 758, 39 L. R. A. 845; *Walter v. Bennett*, 16 N. Y. 250.

² *Hazelton v. Locke*, 104 Me. 164, 71 Atl. 661, 20 L. R. A. (n. s.) 35; citing *Hennequin v. Clews*, 111 U. S. 676, 28 L. Ed. 565, 4 Sup. Ct. Rep. 576; *Orton v. Butler*, 5 Barn. & Ald. 652.

³ *Tinkham v. Hayworth*, 31 Ill. 519.

⁴ *Jackson v. Moore*, 99 App. Div. 504, 87 N. Y. Supp. 1101, overruling former holding in 72 App. Div. 217, 76 N. Y. Supp. 164; *Pratt v. Brewster*, 52 Conn. 65.

⁵ *Cotton v. Sharpstein*, 14 Wis. 226, 80 A. D. 774; see *Supervisors v. Decker*, 30 Wis. 635.

⁶ *Hinckley v. Lewis*, 45 Ill. 327; *Sloan v. Lick Creek Co.*, 6 Ind. App. 584, 33 N. E. 997; *Little v. Gibbs*, 4 N. J. L. 244; *Smith v. Donahue*, 13 S. D. 334; *Lamb v. Clark*, 30 Vt. 347; *Dunham v. Cox*, 81 Conn. 268, 70 Atl. 1033; *Morrin v. Manning*, 205 Mass. 205, 91 N. E. 308; *Holland v. Bishop*, 60 Minn. 23, 61 N. W. 681; *Black v. Black*, Tex. Civ. App., 67 S. W. 928.

⁷ *Larson v. Dawson*, 24 R. I. 317, 53 Atl. 93, 96 A. S. R. 716; *Cooke v. Bryant*, 103 Ga. 727, 20 S. E. 435; *Muskegon Co. v. Hendricks*, 89 Mich. 172; *Petit v. Bonju*, 1 Mo. 64; *Sibley v. Ives*, 21 Barb. 284.

⁸ *Kidder v. Biddle*, 13 Ind. App. 653; *People v. Bank*, 75 N. Y. 547; *Lawatsch v. Cooney*, 86 Hun 546, 33 N. Y. Supp. 775.

⁹ *Krager v. Pierce*, 73 Ia. 359, 35 N. W. 477; *Gratton Co. v. Redelsheimer*, 28 Wash. 370, 68 Pac. 879; *Columbia Mill Co. v. Bank*, 52 Minn. 224, 53 N. W. 1061; *Lovell v. Hammond Co.*, 66 Conn. 500, 34 Atl. 511; *Haas v. Altieri*, 19 N. Y. Supp. 687.

sory note.¹ The conversion may occur in various ways and under a variety of circumstances. Thus, he is guilty who has negotiated a note before the happening of an event upon which its negotiation was contingent;² or diverted it to a purpose different from that for which it was given to him;³ or obtained it without legal delivery and negotiated it to a *bona fide* holder;⁴ or taken it without permission after refusal of the consideration;⁵ or purchased it after maturity from an agent who had fraudulently transferred it to him.⁶ And trover for conversion may be maintained by the maker of a promissory note against the payee after the note has been fully paid if the payee, having the note in his possession, refuses to deliver it to the maker, or if, after payment, the payee disposes of the note.⁷ This is the general rule as to all instruments which have been paid, although it was said in one case that if the note had been paid before the conversion, or in any manner legally discharged, trover would not lie to recover the value of it, for in fact it would have no value.⁸ And where bills were delivered as a pledge and the full demand was tendered to the holder and he refused to return the pledge, he was held liable for a conversion.⁹ Likewise, a sale of a non-negotiable instrument to a purchaser in good faith and for a valuable consideration by one who has feloniously gotten it from the owner, does not divest the property of the true owner, and he may maintain trover against the purchaser for its conversion.¹⁰ But the rule is otherwise where the instrument is negotiable and transferred for value and before maturity to a *bona fide* purchaser.¹¹

§ 20. Where Consideration of Note Illegal. — The action of trover,

¹ Hicks v. Lyle, 46 Mich. 488, 9 N. W. 529; Buck v. Kent, 3 Vt. 99, 21 A. D. 576; Lincoln Bank v. Allen, 82 Fed. 148; Romero v. Newman, 50 La. Ann. 80, 23 So. 492; Halbert v. Rosenbalm, 49 Neb. 498; Smith v. Durham, 127 N. C. 417; Harris v. Cable, 104 Mich. 365; Richardson v. Ashby, 132 Mo. 238; Holmes v. Langston, 110 Ga. 861; Lyle v. Harvesting Co., 108 Wis. 81; Warder Co. v. Cuthbert, 99 Ia. 681; Security Bank v. Fogg, 148 Mass. 273.

² Brown v. St. Charles, 66 Mich. 71, 32 N. W. 926; Thompson v. Carter, 6 Ga. App. 604, 65 S. E. 599.

³ Comstock v. Hier, 73 N. Y. 269.

⁴ Decker v. Mathews, 12 N. Y. 313.

⁵ Van Cleave v. Beach, 110 Ind. 269, 11 N. E. 228.

⁶ Vermilye v. Express Co., 21 Wall. 138, 22 L. Ed. 609; Wood v. McKean, 64 Ia. 16, 19 N. W. 817.

⁷ Stone v. Clough, 41 N. H. 290; Atisfield v. Mayberry, 63 Me. 197; Spencer v. Dearth, 43 Vt. 98.

⁸ Lowremore v. Berry, 19 Ala. 130, 54 A. D. 188.

⁹ Abrahams v. Bank, 1 S. C. 441, 7 A. R. 33; see also Davis v. Funk, 39 Pa. St. 243, 80 A. D. 519.

¹⁰ Scollans v. Rollins, 173 Mass. 275, 53 N. E. 863, 73 A. S. R. 284; O'Herron v. Gray, 168 Mass. 573, 47 N. E. 429, 60 A. S. R. 411.

¹¹ *Id.*; Ditch v. Bank, 79 Md. 192, 47 A. S. R. 375 and note. Such is the case of a note payable in a commodity other than money: Hicks v. Lyle, 46 Mich. 488, 9 N. W. 529.

however, cannot be maintained for the conversion of a note the consideration of which was illegal as against public policy,¹ although it has been held that the action will lie where the indorsement was prohibited by a gambling act,² and where the note had been taken for a usurious loan.³ It has been held that if one is intrusted with a note or bill to get it discounted and apply the proceeds in a certain way, but after such discounting he applies them to a different use, he cannot be held in trover but the action must be for money had and received.⁴ But in another case the plaintiff had delivered to the defendant a note to have discounted, with instructions not to let it go out of his possession without receiving the proceeds. The defendant delivered the note to a third person who promised to get it discounted and return the money; the latter got the money but appropriated it to his own use. It was held that the defendant was liable for a conversion of the note.⁵ The payee of a note transferred it contrary to an agreement, and the transferee secured a judgment upon it; it was held that the payee was liable for its conversion.⁶ Other illustrations of the conversion of bills and notes will be found in the following cases.⁷

3. SHARES OF STOCK

§ 21. **Difference between Conversion of Shares and Certificate.**—Trover is the proper action to be brought where shares of stock in a corporation have been converted.⁸ A distinction has been drawn between cases of conversion of shares of stock and conversion of the certificate; and it has been held that the action should not be brought for the shares of stock but for the certificate which represents them.⁹ But no good reason appears why, if the shares are converted by means of a wrongful use of the certificate, the owner in suing may not count upon the conversion of either. The shares are the property converted, but the certificate is also property standing as it does as the

¹ *Morrill v. Goodenow*, 65 Me. 178.

² *Williams v. Wall*, 60 Mo. 318.

³ *Kentgen v. Parks*, 2 Sandf. 60.

⁴ *Forbes v. Jason*, 6 Ill. App. 395; *Shrimpton v. Culver*, 109 Mich. 577, 67 N. W. 907.

⁵ *Lavery v. Snethen*, 68 N. Y. 522, 23 A. D. 184.

⁶ *Buck v. Kent*, 3 Vt. 99, 21 A. D. 576.

⁷ *Comparet v. Burr*, 5 Blackf. 419; *Gillespie v. Evans*, 10 S. D. 234; *Tucker v. Jewett*, 32 Conn. 563; *Thomson v. Gortner*, 73 Md. 474, 21 Atl. 371; *Vroom v. Sage*, 184 N. Y. 542, 76 N. E. 1111; *Vansandt v. Hobbs*, 84 Mo. App. 628; *Thomas v. Morse*, 80 Tex. 289; *Hallack Lumber Co. v. Gray*, 19 Colo. 149, 34 Pac. 1000; *Krager v. Pierce*, 73 Ia. 359, 35 N. W. 477; *Hallehan v. Roughan*, 62 Wis. 64, 22 N. W. 163.

⁸ *Morton v. Preston*, 18 Mich. 60, 100 A. D. 146.

⁹ *Neiler v. Kelley*, 69 Pa. St. 403.

representative of the shares, and as its conversion may take the shares from the owner, it seems as proper to count upon its conversion as upon the conversion of any other chattel.¹ And there may be a technical conversion, inducing nominal damages, even though the defendant could not have transferred or used the certificate.² In reality there can be no difference between the conversion of the shares and a conversion of the certificate, for the latter is merely the paper representative or evidence of the former and has no value apart from them; to convert one is to convert the other, for it is the stock that is converted in either case.³ "The doctrine that the pledgee is guilty of the conversion of the shares whenever, during the pendency of the debt secured by the pledge, he exercises acts of dominion over the share certificate which has been delivered to him in pledge, so that he disables himself from restoring the particular certificate, must be either a very technical doctrine, or else it must be made to rest on public policy which will not uphold the pledgee in dealing with the pledge in any way as his own property, but which, on principles of business morality and honesty, requires him to put it in his safe, or in the safe of his banker or safe deposit company, and there keep it securely until the debt is paid or his right to sell it accrues."⁴

§ 22. **How Conversion of Stock may Occur.** — A certificate of stock in a corporation was pledged as collateral security and was transferred by the pledgee to a creditor of his own; the pledgee was held liable for its conversion.⁵ It is said that in such a case the pledgee must either replace the share or pay enough money for his wrong to enable the pledgor to replace it.⁶ So, the wrongful and irregular sale of the stock of a shareholder in a corporation for the non-payment of dues is a conversion of the stock by the corporation for which an action can be sustained against it by the owner or his assignee; and it is not necessary in such action for him to surrender the certificate of stock.⁷ And where a party purchases shares of stock in a corporation from a stockholder therein, in accordance with

¹ *Daggett v. Davis*, 53 Mich. 35, 18 N. W. 548, 51 A. R. 91.

² *Id.*

³ *Ayres v. French*, 41 Conn. 151; *Boylan v. Huguet*, 8 Nev. 352; *Kuhn v. McAllister*, 1 Utah 275 (96 U. S. 87, 24 L. Ed. 615); *Maryland Co. v. Dalrymple*, 25 Md. 242, 89 A. D. 779; *Anderson v. Nicholas*, 28 N. Y. 600.

⁴ 2 Thompson, Corporations, 2652.

⁵ *Fay v. Gray*, 124 Mass. 500; *contra*, where shares could be delivered to the pledgor other than the identical ones pledged: *Atkins v. Gamble*, 42 Cal. 86, 10 A. R. 282; *Gilpin v. Holwell*, 5 Pa. St. 41, 45 A. D. 720.

⁶ *Fowle v. Ward*, 113 Mass. 548, 18 A. R. 534; *Allen v. Dubois*, 117 Mich. 115, 117 N. W. 175, 72 A. S. R. 557; see *Kullman v. Greenbaum*, 92 Cal. 403, 28 Pac. 674, 27 A. S. R. 150.

⁷ *Carpenter v. B. & L. Association*, 54 Minn. 403, 56 N. W. 95, 40 A. R. 345; citing *Allen v. Same*, 49 Minn. 544, 52 N. W. 144, 32 A. S. R. 574.

the laws and rules of the corporation, and regularly demands a transfer and certificate to him which is refused upon an untenable ground, the company is liable in an action for conversion of the shares.¹ And the same right of action attaches in favor of an assignee of one who has subscribed to the capital stock of a corporation but to whom no certificate had been issued.² Likewise, the corporation cannot escape liability where it has transferred shares on its books to the wrong party.³ For other instances of conversion of shares, see the following cases.⁴

4. MUNIMENTS OF TITLE

§ 23. **What Are, and Whether may be Converted.** — A muniment is defined to be a written instrument by which rights and claims are maintained or defended.⁵ Therefore, muniments of title are paper evidence of interests in or affecting the ownership of real estate; and, not being the title itself, they are personalty and, consequently, subject to conversion, so that if he who is entitled to their possession is deprived of it, or if the owner's right and title be wrongfully interfered with, trover may be maintained against the wrong-doer.⁶ Thus, land contracts may be converted, as also may deeds, in which case the action is for the value of the deed;⁷ but if in an action for the conversion of a deed a dispute as to its delivery involves a question as to the title of the land, the action must fail.⁸ The action of trover will lie for the conversion of a mortgage,⁹ land certificate,¹⁰ or bill of lading.¹¹

5. JUDGMENTS AND RECORDS

§ 24. **Not Subject to Conversion.** — In the few cases in which the question has arisen it is established that judgments of a court

¹ *Bond v. Mt. Hope Co.*, 99 Mass. 505, 97 A. D. 49; *Kahn v. Bank*, 70 Mo. 262; *N. Y. Railway v. Schuyler*, 34 N. Y. 30.

² *Rio Grande Co. v. Burns*, 82 Tex. 50, 17 S. W. 1043.

³ *Hawes v. Gas Co.*, 9 N. Y. Supp. 490.

⁴ *Withers v. LaFayette Bank*, 67 Mo. App. 115; *Franklin Bank v. Harris*, 77 Md. 423, 26 Atl. 523; *McDonald v. Danahy*, 96 Ill. App. 380, 196 Ill. 133; *Continental Co. v. Bliley*, 23 Colo. 160, 46 Pac. 633; *London Bank v. Aronstein*, 117 Fed. 601, 54 C. C. A. 663; *Herrick v. Hdw. Co.*, 73 Neb. 809, 103 N. W. 635; *Kahaley v. Haley*, 15 Wash. 678, 47 Pac. 23; *Budd v. Railway Co.*, 12 Ore. 271, 7 Pac. 99, 53 A. R. 355; *Connor v. Hillier*, 11 Rich. 193, 73 A. D. 105.

⁵ *Century Dictionary*.

⁶ *Hazenwell v. Coursen*, 45 N. Y. Sup. Ct. 22.

⁷ *Weiser v. Zeisinger*, 2 Yeates (Pa.) 537; *Towle v. Lovet*, 6 Mass. 394.

⁸ *Hooker v. Latham*, 118 N. C. 179, 23 S. E. 1004.

⁹ *Gaywood v. Van Ness*, 74 Hun 28; *Gleason v. Owen*, 35 Vt. 590; *Howard v. Bank*, 10 Wash. 280, 38 Pac. 1040, 39 Pac. 100; *Wyly v. Grigsby*, 10 S. D. 13.

¹⁰ *Wilson v. Rucker*, 1 Call (Va.) 500.

¹¹ *Alderson v. Railway Co.*, Tex. Civ. App., 23 S. W. 617.

are not subjects of conversion, and consequently the action of trover cannot be maintained concerning them. To support the action of trover, the plaintiff must have in himself at the time of the conversion the right of property, either general or special, and also must in general have in himself the right of possession. A judgment is not the subject of private ownership. It is neither goods nor chattels, nor has either party an exclusive property in it. To the plaintiff it is the evidence of a legal obligation of the defendant to pay, and to the latter a protection from further liability on the original cause of action. It is a public writing which, from its nature, cannot belong to any one as an article of property; but it belongs to the court who gave it, as a public custodian, to be kept by him until drawn out of his hands by the regular requirements of the law.¹ And the same rule is applied where the subject sought to be recovered for is a record.²

6. BUILDINGS

§ 25. **If Personal Property, may be Converted.** — The action of trover is not maintainable to recover damages to real estate, but the subject of the action must in all cases be personal property.³ The right to recover for the conversion of a building will, therefore, depend upon the question of whether the building is personalty or a part of the realty. Where a building is erected by one man upon the land of another and by the latter's permission, upon an agreement or understanding that it may be removed at the pleasure of the builder, it does not become a part of the real estate, but continues to be a personal chattel, and the property of him who erected it.⁴ And in such case, if the owner of the land resists the removal of such building, or otherwise converts it to his own use, he will be liable in trover for the value of it either to the builder or his assignee.⁵ And to constitute a conversion of it, there must be some active opposition by the owner of the land to the removal of the building for he owes no duty to the builder to deliver it or remove it upon the demand of the latter.⁶ There is some contrariety among the cases as to where

¹ *Cobb v. Carnegay et al.*, 6 Ired. 358, 45 A. D. 497, overruling *Hudspeth v. Wilson*, 13 N. C. 372, 21 A. D. 344; see *Platt v. Potts*, 11 Ired. 266, 53 A. D. 412.

² *Keller v. Fassett*, 21 Vt. 539, 52 A. D. 71. In this case, however, the plaintiff was permitted to recover for the conversion of an execution, the court basing its decision on the ground that the execution had relation to the record proper but was not a part of it. But in another case where the execution had been satisfied, the plaintiff was not allowed to recover for its conversion: *Little v. Gibbs*, 4 N. J. L. 244.

³ *Glencoe Land Co. v. Hudson Bros. Co.*, 138 Mo. 439, 60 A. S. R. 560; *Thweat v. Stamps*, 67 Ala. 96.

⁴ *Dame v. Dame*, 38 N. H. 429, 75 A. D. 195, citing *Wells v. Bannister*, 4 Mass. 514; *Brearily v. Cox*, 24 N. J. L. 287; *Haven v. Emery*, 33 N. H. 429; *Curtiss v. Hoyt*, 19 Conn. 154, 48 A. D. 149.

⁵ *Id.*

⁶ *Id.*

the ownership lies of a building erected on the land of one other than the builder and, therefore, as to whether the building is personalty or a part of the realty;¹ but these are questions not germane to the present discussion. The rule is practically universal that trover lies for a building erected by consent on lands not owned by the builder where the owner or one purchasing from him refuses to permit its removal, in all cases where the building is held to be personal property.² But it has been held that where one has erected a house on the land of another under an agreement to purchase the land, and has rented the house, he cannot treat it as personal property and bring trover against a third party for its conversion.³ And where the mortgagor of a house and lot removed the house and used the materials to erect a house on another lot owned by him which he afterward conveyed to a third person, it was held that such house was a part of the freehold and the mortgagee could not maintain trover for its conversion or that of the materials, as title to same vested in the grantee.⁴

7. FIXTURES

§ 26. **May be Converted if not Part of Realty.** — So long as fixtures remain attached to the freehold, they are a part of it and trover cannot be maintained for an alleged conversion of them.⁵ Thus, where machinery has been incorporated in a mill as a part of it, and is so used by the owners of the mill, such use does not constitute a conversion.⁶ And where a fixture is annexed by a tenant for purposes of trade or other immediate or temporary use, he may, while remaining in possession, sever it from the land and thus change its character back again from realty to personalty; but if, without such severance, he voluntarily quits the premises at the expiration of his term without any agreement with his landlord, neither he nor his vendee can maintain trover against the landlord for a conversion of the fixtures left attached.⁷

¹ *Russell v. Richards*, 11 Me. 371; *First Parish v. Jones*, 8 Cush. 190; *Poor v. Oakman*, 104 Mass. 318.

² *Hilborne v. Brown*, 12 Me. 162; *Sparks v. Hess*, 15 Cal. 197; *Smith v. Benson*, 1 Hill. 176; *Osborn v. Potter*, 101 Mich. 300, 59 N. W. 606; *Hinckley v. Baxter*, 95 Mass. 139; *Adams v. Goddard*, 48 Me. 212.

³ *Bracelin v. McLaren*, 59 Mich. 327, 26 N. W. 533.

⁴ *Pierce v. Goddard*, 39 Mass. 559.

⁵ *Straw v. Straw*, 70 Vt. 240, 39 Atl. 1095; *Prescott v. Wells Fargo Co.*, 3 Nev. 82; *Danah v. Baird*, 101 Pa. St. 265; *Guthrie v. Jones*, 108 Mass. 196.

⁶ *Woodruff, etc., Co. v. Adams*, 37 Conn. 233.

⁷ *Bliss v. Whitney*, 9 Allen (Mass.) 114, 85 A. D. 745; *Overton v. Williston*, 31 Pa. 155; *Rosenan v. Syring*, 25 Ore. 386, 35 Pac. 844.

§ 27. **Agreement of Parties Determines Character.** — But the agreement of the parties at the time of the annexation of the fixtures to the freehold may be such that the rule is altered with respect to a conversion of personalty which has become a part of the realty. Thus, where machinery for a mill was sold under an agreement that title to same should not pass until payment of the purchase-price had been made, but it was attached to realty which the owner sold without paying for the machinery, the purchaser was held in trover for the value of the machinery, it being shown in the case, however, that he had sufficient information concerning the transaction to put him on notice as to the rights of the vendor of the machinery.¹ The theory, however, is that the fixtures, under such circumstances, do not become a part of the realty even though they are attached to it, but maintain their character as personalty by virtue of the agreement that they may be severed and removed by him who so annexes them to the freehold.² But one who wrongfully severs and removes fixtures, as a tenant who abandons his term, may be held for a conversion,³ even though the fixture is re-attached to another freehold.⁴

8. CROPS

§ 28. **May be Converted if Personalty.** — The propriety of classifying crops as a subject of conversion involves a consideration of their nature as to being personal or real property. In regard to sales of crops, it is said that the prevailing and better rule now is that if, by the fair interpretation of the contract, the thing sold is to be immediately or within a reasonable time removed from the soil and carried away, and is not to be left to grow and attain additional strength and increase from the earth, the sale is that of personal property and not of an interest in land.⁵ This is especially true of crops that are artificial or annual,⁶ such as growing corn,⁷ standing grain,⁸ grass ready to cut,⁹ a crop of fruit,¹⁰ or ice,¹¹ and trees to be cut

¹ *Ingersoll v. Barnes*, 47 Mich. 104, 10 N. W. 127; see also *Walker v. Schindel*, 58 Md. 360; *Crippin v. Morison*, 13 Mich. 23.

² *Walsh v. Sichler*, 20 Mo. App. 374; *Greenbaum v. Taylor*, 102 Cal. 624, 36 Pac. 957; *Davis v. Buffum*, 51 Me. 160; *Watts v. Lehman*, 107 Pa. St. 106; *Vilas v. Mason*, 25 Wis. 310; *Davis v. Taylor*, 41 Ill. 405; *Shapiro v. Barney*, 30 Minn. 59, 14 N. W. 274; *Bahr v. Boley*, 50 N. Y. App. Div. 577.

³ *Morgan v. Negley*, 3 Pittsb. R. 33; *Whidden v. Seelye*, 40 Me. 247, 63 A. D. 661.

⁴ *Id.*; *Woods v. McCall*, 67 Ga. 506.

⁵ *Benjamin on Sales* (7th ed.) 133.

⁶ *Id.*

⁷ *Bricker v. Hughes*, 4 Ind. 146.

⁸ *Marshall v. Ferguson*, 23 Cal. 65; *Westbrook v. Eager*, 16 N. J. L. 81; *Moreland v. Myall*, 14 Bush 474.

⁹ *Banton v. Shorey*, 77 Me. 48.

¹⁰ *Purner v. Piercy*, 40 Md. 212.

¹¹ *Higgins v. Kusteren*, 41 Mich. 318.

into cord wood.¹ And when such come within the category of personal property and are subject to the rules governing same, they may be converted and the action of trover maintained for such conversion. Thus, a tenant sowed wheat on shares and assigned his interest before harvest. The landlord later sold the tenant's share and refused to let the latter's assignee remove same. It was held that these facts constituted a cause of action against the landlord for a conversion of the tenant's share.² And it has been held that the mere unintentional cutting of grass in ignorance of the true boundary line of the land upon which the defendant had the right to cut is a conversion of the grass, even though the defendant has not attempted to remove it nor prevented the plaintiff from removing it.³ It would seem, however, that under the facts of this case the law governing and defining a conversion was somewhat stretched inasmuch as the defendant assumed no ownership or control over the grass but simply altered its condition. But the authorities quoted in the opinion amply justify the court in its holding. For instance, it is said: "Every assuming to dispose of the property of another, or the least inter-meddling with it in a manner subversive of the dominion which the owner has over it, is sufficient evidence of a conversion."⁴ The case was decided upon the further ground that it is not necessary in a conversion that there should be a manual taking of the property, nor is it necessary that the defendant should have applied the property to his own use; the cutting of the grass was an exercise of dominion over it inconsistent with or in defiance of the owner's rights. Contrary to this, however, it has been held that one who severs corn from a field and uses it cannot be held in trover for its conversion.⁵

§ 29. **Wrongful Removal a Conversion.** — The Missouri court has gone farther than that of Rhode Island referred to in holding a defendant liable for the conversion of crops. A tenant of a farm, on leaving the state, sold to plaintiffs the right to graze their stock on grass and stalks growing on the farm, plaintiffs to care for the leased premises during the tenant's absence. The landlord turned out the stock and locked the gates of the premises. It was held that he was guilty of converting the stalks and grass.⁶ In another case the

¹ Benjamin on Sales, 133, citing above cases.

² Dale v. Jones, 15 Ind. App. 420, 44 N. E. 316.

³ Donahue v. Shippee, 15 R. I. 453, 8 Atl. 541.

⁴ Reid v. Colcock, 1 Nott & McC., 592, 598.

⁵ Platner v. Johnson, 26 Miss. 142; but see Davis v. Barnes, 3 Mo. 137.

⁶ Leidy v. Carson, 115 Mo. App. 1, 90 S. W. 754; see Mueller v. Olson, 90 Minn. 416, 97 N. W. 115; Stafford v. Ames, 9 Pa. St. 343.

defendant was held liable in trover for the removal of crops from land held adversely.¹ And generally, if the crops, whether growing or matured and harvested, be wrongfully removed by the owner of the fee, he will be liable in trover for their value.²

§ 30. **Whether Purchase of, a Conversion.** — But the mere purchase of a crop upon which another has a lien is not of itself destructive of the lien so as to give the lienor a right of action against the purchaser for the wrongful conversion of the property.³ This decision was reached on account of the fact that the plaintiff failed to prove that the property had been so dealt with as to make it impossible for him to enforce his lien. In another case it was held that a stipulation in a farm lease that straw should not be removed from the premises gave the landlord no interest therein during the continuance of the term which would entitle him to an action for a conversion in case of its removal by the tenant.⁴

9. TIMBER

§ 31. **Cannot be Converted till Severed.** — As long as trees are standing rooted to the soil they are a part of the freehold, and, therefore, not properly subject to conversion. But upon their being severed, either rightfully or wrongfully, their character is changed to personalty and they become subject to the rules of law relating to other personal property, and an action for their conversion may be maintained. The cutting of the trees may itself constitute the conversion,⁵ or their removal after being cut,⁶ or their use after removal.⁷ And whether one of such acts be relied upon to constitute the conversion or a union of all three, liability attaches whether the act be willful and intentional or whether it be under the honest but mistaken belief that the defendant is acting within his rights.⁸ A

¹ *Pac. L. Stock Co. v. Isaacs*, 52 Ore. 54, 96 Pac. 460.

² *Backenstoss v. Stahler's Admrs.* 33 Pa. St. 251, 75 A. D. 592; 1 *Chitty, Pleading*, 152; *Stultz v. Dickey*, 5 Binn. 285; *Myers v. White*, 1 Rawle 353; *Forsythe v. Price*, 8 Watts 283, 34 A. D. 465; see *Ambuehl v. Mathews*, 41 Minn. 537, 43 N. W. 477; *Whitney v. Huntington*, 37 Minn. 197, 33 N. W. 561.

³ *Windham v. Stephenson*, 156 Ala. 341, 47 So. 280, 19 L. R. A. (N. S.) 910.

⁴ *Munier v. Zachary*, 138 Ia. 219, 114 N. W. 525, 19 L. R. A. (N. S.) 572.

⁵ *Skinner v. Pinney*, 19 Fla. 42, 45 A. R. 1.

⁶ *Gaskins v. Davis*, 115 N. C. 85, 20 S. E. 188, 44 A. S. R. 439; *Beede v. Lamphrey*, 64 N. H. 510, 15 Atl. 133, 10 A. S. R. 426; *Tilden v. Johnson*, 52 Vt. 628, 36 A. R. 769.

⁷ *White v. Yawkey*, 108 Ala. 270, 19 So. 360, 54 A. S. R. 159; *Wing v. Milliken*, 91 Me. 387, 40 Atl. 138, 64 A. S. R. 238; *Chappell v. Puget S. R. Co.*, 27 Wash. 63, 67 Pac. 391, 91 A. S. R. 820; *Tuttle v. White*, 46 Mich. 485, 9 N. W. 528, 41 A. R. 175.

⁸ *Thornton v. St. L. Ry. Co.*, 69 Ark. 424, 65 S. W. 113; *Anderson v. Besser*, 131 Mich. 481, 91 N. W. 737; *Hodson v. Gooddale*, 22 Ore. 68, 29 Pac. 70; *Fisher v. Brown*, 70 Fed. 570; *Ward v. Carson R. Co.*, 13 Nev. 44; *Hastay v. Bonness*, 84 Minn. 120.

question that has been presented to the courts in this connection more frequently than any other has relation to the measure of damages to be awarded a plaintiff whose trees or timber have been converted by the defendant. It is rather remarkable too that this question should be raised so often when the courts are so uniform in their holding concerning it. The question of the measure of recovery in suits for conversion will be reserved for a future chapter in this work, but it is not out of place to state here the rule which is applied in cases of proved conversion of trees or timber.

§ 32. **Question as to Measure of Damages.** — The weight of authority is declared to be in favor of the rule which gives compensation for the loss, that is, the value of the property at the time and place of conversion, with interest after, allowing nothing for value subsequently added by the defendant, when the conversion does not proceed from willful trespass but from the wrong-doer's mistake or from his honest belief of ownership in the property and there are no circumstances of special and peculiar value to the owner or a contemplated special use of the property by him.¹ Or, bringing the rule down to the subject under discussion, it is said that where timber has been cut by trespassers or converted into some other form and its value thereby increased, the measure of damages must not be the value of the timber as altered after its severance.² This rule has been denied as the proper basis of recovery, and it has been said that the plaintiff should recover judgment for all enhancement of value from any cause before suit brought.³ This latter ruling has been followed by the Wisconsin courts to a certain extent,⁴ and while the great mass of authority is against it, there is some reason back of it not to be passed over lightly. A plaintiff who has been wrongfully deprived of his property or its possession may sue in replevin for recovery of possession or may sue in trover for the conversion of the property. If he sue in replevin, he is entitled to the property in its condition at the time of recovery, including any enhancement of value; but according to the rule first announced above, if he sue in trover he is not entitled to any increased value between the time of

¹ *Beede v. Lamprey*, 64 N. H. 510, 15 Atl. 133, 10 A. S. R. 426; *Sedgwick, Damages*, 5th ed., 571; *Cooley, Torts*, 457; *Hedrick v. Young*, 55 Pac. St. 176, 93 A. D. 739; *Wooley v. Carter*, 7 N. J. L. 85, 11 A. D. 520; *Franklin C. Co. v. McMillan*, 49 Md. 549, 33 A. R. 280.

² *Railroad Co v. Hutchins*, 32 Ohio St. 571, 30 A. R. 629; *Skinner v. Pinney*, 19 Fla. 42, 45 A. R. 1; *Tilden v. Johnson*, 52 Vt. 628, 36 A. R. 769.

³ *Robertson v. Jones*, 71 Ill. 405; *Ill. etc. Co. v. Ogle*, 82 Ill. 627, 25 A. R. 342; *Betts v. Lee*, 5 Johns. 348, 4 A. D. 368; *Baker v. Wheeler*, 8 Wend. 505, 24 A. D. 66; see, however, *Spicer v. Waters*, 65 Barb. 247.

⁴ *Webster v. Neal*, 35 Wis. 78; *Single v. Schneider*, 24 Wis. 301, and 30 Wis. 572.

conversion and the time of recovery. The Wisconsin court has this to say: "In determining the question of recaption the law must either allow the owner to retake the property or it must hold that he has lost his right by the wrongful act of another. If retaken at all, it must be taken as it is found, though enhanced in value by the trespasser. It cannot be returned in its original condition. The law therefore being obliged to say either that the wrong-doer shall lose his labor, or the owner shall lose the right to take the property wherever he may find it, very properly decides in favor of the latter. But where the owner voluntarily waives the right to reclaim the property itself, and sues for damages, the difficulty of separating the enhanced value from the original value no longer exists. . . . But where the wrong-doer has by his own act created a state of facts, when either he or the owner must lose, the law says the wrong-doer shall lose."¹ The policy of the law being, however, to compensate a plaintiff for the loss actually sustained through the act of the defendant in depriving him of his timber or trees, the courts are almost uniform in holding that this loss shall be estimated according to the value of the trees when converted, which is usually at the time they are severed from the freehold.² One court, however, has remarked that "To say that the owner may retake the property in replevin in an improved condition, as all the authorities hold, and yet that he may not, when he sees fit to resort to an action of trover, recover the equivalent in damages, is a subtlety too refined to be adopted in the ordinary affairs of business transactions, and as said in *Powers v. Tilley*,³ would relieve trespassers from all loss, and would tend to encourage wrong-doing."⁴

10. ROCK, GRAVEL AND ORE

§ 33. **Are not Subject to Conversion till Severed from Soil.** — Rock, gravel and ore, while remaining in their original state where nature put them, are not personal property, but are a part of the realty and of course are not subject to be converted unless removed from their bed. But their wrongful removal, even through an honest

¹ *Wymouth v. Chicago, etc. Co.*, 17 Wis. 550, 84 A. D. 763; see *Isle R. M. Co. v. Hertin*, 37 Mich. 332, 26 A. R. 529.

² *Glaspy v. Cabot*, 135 Mass. 435; *Hill v. Canfield*, 56 Pa. St. 454; *Goller v. Fett*, 30 Cal. 482; *Foote v. Merrill*, 54 N. H. 490, 20 A. R. 151; *Chappell v. Puget S. R. Co.*, 27 Wash. 63, 67 Pac. 391, 91 A. S. R. 820; *White v. Yawkey*, 108 Ala. 270, 19 So. 360, 54 A. S. R. 159.

³ 87 Me. 34, 32 Atl. 714, 47 A. S. R. 304.

⁴ *Wing v. Milliken*, 91 Me. 387, 40 Atl. 138, 64 A. S. R. 238; see *Tuttle v. White*, 46 Mich. 485, 9 N. W. 528, 41 A. R. 175.

mistake, will constitute a conversion for which trover will lie. Thus, a defendant, through error, had gone beyond his own line and mined and carried away coal belonging to plaintiff. The court held him liable for the conversion of the coal, giving judgment for its value prior to its removal.¹ And trover for iron ore may be maintained by one in possession of land who has dug the ore by virtue of a conveyance of the right to do so by the owner of the land against a person taking and converting the ore after it is dug.² But here, as in other cases, the plaintiff must have the actual or constructive possession of the land at the time of the conversion or he cannot maintain trover. Thus, it has been held that one who has the right to the possession of a certain tract of land cannot maintain trover for stone and gravel dug therefrom against one who has the actual adverse possession of the land and sets up title thereto.³ The reason of this is that to hold otherwise would in reality permit the determination of opposing claims of title to the land in an action of trover.

§ 34. **Same Subject.** — A case was brought against a railway company for damages as for the conversion of sand and gravel which it was alleged the defendant refused to haul from plaintiff's land. The sand and gravel had never been removed from its original bed. The court very properly sustained a demurrer to the petition for the reason that the sand and gravel had never become personal property and therefore could not be converted.⁴ Another case somewhat unusual but worthy of note, which, however, was brought in replevin and not for a conversion, arose over an *ærolite* which fell and became embedded in the land of plaintiff but was bought by defendant from one who had removed it from plaintiff's land. The court held that the *ærolite* became a part of the soil and therefore the property of plaintiff.⁵ Had the action been in trover instead of replevin, doubtless the court would have reached the same conclusion, holding the removal of the *ærolite* as well as its purchase by defendant a conversion.

¹ Forsyth v. Wells, 41 Pa. St. 291, 80 A. D. 617.

² Grubb v. Guilford, 4 Watts 223, 28 A. D. 700; Aikin v. Buck, 1 Wend. 466.

³ Mather v. Trinity Church, 3 Serg. & R. 509, 8 A. D. 663; Harlan v. Harlan, 15 Pa. St. 507.

⁴ Glencoe Co. v. Hudson Bros. Co., 138 Mo. 439, 40 S. W. 93, 41 A. S. R. 481.

⁵ Goddard v. Winchell, 86 Ia. 71, 52 N. W. 1124, 41 A. S. R. 481; see, generally, Graham v. Purcell, 126 N. Y. App. Div. 407, 110 N. Y. Supp. 813; Nashville Ry. Co. v. Karthaus, 150 Ala. 633, 43 So. 791; Benson Co. v. Alta Min. Co., 145 U. S. 428; Col. Co. Co. v. Turck, 70 Fed. 294; Hartford Co. v. Cambria Co., 93 Mich. 90, 53 N. W. 4, 32 A. S. R. 488; Thomas Co. v. Hester, 60 Ill. App. 58; Sunnyside Co. v. Reitz, 14 Ind. App. 478, 39 N. E. 541, and 43 N. E. 46; Tex. Ry. Co. v. White, 25 Tex. Civ. App. 278, 62 S. W. 133; Ill. Cent. Ry. Co. v. LeBlanc, 74 Miss. 626.

11. ANIMALS

§ 35. Domestic and Reclaimed Wild Animals may be Converted.

— The action of trover is maintainable for every species of personal property whether animate or inanimate.¹ Therefore, if animals are property, they may be the subject of a conversion and the action of trover. If they are of a tame and domestic nature, they are the subjects of absolute property.² And animals *ferae naturae*, so long as they are reclaimed by the art and power of man, are also subjects of a qualified property. And while this qualified property continues it is as much under the protection of the law as any other property and every invasion of it is redressed in the same manner.³ But to support the action of trover for this species of property, there must be some distinguishing marks of appropriation or ownership, or the plaintiff must have had actual possession at the time of the alleged conversion. Thus, oysters planted in public waters are not such property as may be converted.⁴ But trover may be maintained for a whale that has been killed and anchored and appropriately marked for identification.⁵ In another case, plaintiff was the owner of two wild geese, which, though not animals, yet are subject to the same laws of property. The geese which had been tamed had been pledged to the defendant for liquor by two men who had taken them from plaintiff's premises. The court held that the plaintiff had sufficient property in the geese to support an action of trover against the defendant for their conversion.⁶ So, trover lies generally for the conversion of domestic fowls;⁷ and for domestic animals, such as a cow that has been wrongfully impounded or seized under execution.⁸ And by the common law, and in some states by statutory provision, dogs are so far regarded as property as that an action of trover will lie for their conversion.⁹ It is true that decisions may be found to the effect that a dog is not a "domestic animal,"¹⁰ but this is contrary to reason and the weight of authority. The better view is presented by Appleton, C. J., dissenting from the opinion cited:

¹ Wait's Actions & Defenses, 128, 155.

² 1 Am. & Eng. Enc. of L. 572.

³ 2 Kent's Com. 348. Where a party placed an empty bee box in a tree on the land of another without obtaining his consent; and subsequently bees entered the same, and a third party appropriated the bees and their honey, the party who first placed the box there could not maintain an action of trover for the bees and honey, as he was a trespasser and the bees were not his property: *Rexroth v. Coon*, 15 R. I. 35, 23 Atl. 37; see, also, *Fisher v. Stewart*, Smith (N. H.) 60.

⁴ *Shepard v. Levenson*, 2 N. J. L. 369.

⁵ *Taber v. Jenny*, 1 Sprague (U. S.) 315.

⁶ *Amory v. Flynn*, 10 Johns. 102, 6 A. D. 316.

⁷ *Leonard v. Belknap*, 47 Vt. 602.

⁸ *Drew v. Spaulding*, 45 N. H. 472; *Norton v. Rokey*, 46 Mich. 460, 9 N. W. 492.

⁹ *Murray v. People*, 86 N. Y. 365; *People v. McMaster*, 10 Abb. Pr. N. S. 132; *Lynn v. State*, 33 Tex. Cr. Rep. 153; 4 Blackstone's Com. 236.

¹⁰ *State v. Harriman*, 75 Me. 562, 46 A. R. 423.

"A dog is the subject of ownership. Trespass will lie for an injury to him. Trover is maintainable for his conversion. Replevin will restore him to his master. He may be bought and sold. An action may be had for his price. The owner has all the remedies for the vindication of his rights of property in this animal as in any other species of personal property he may possess."¹

§ 36. **Conversion of Hired Animals.** — The question of conversion arises more frequently perhaps in cases relating to the hiring and use of horses than to any other class of animals. And the rule is that where one hires a horse for a particular time or to go to a particular place or for a specified distance, but uses the horse a longer time, or goes to a different place or a greater distance than that agreed upon, he will be liable for a conversion of the horse if same be injured during such use.² Courts have been called upon to say whether such rule shall be applied when the agreement for the hiring of the horse was made on Sunday. And in such cases the holding is almost without exception that, although the contract for the hiring of the horse is illegal and void, the owner of the horse may maintain trover if a conversion occur.³ In regard to such a contract it is said: "The illegal letting may or may not appear. If it does, it simply explains the defendant's possession, and proves that it was by the owner's permission, at least for a certain purpose. It may give the defendant an opportunity to injure the horse, but it does not cause the injury; nor does it contribute to it in such a sense as to make the plaintiff a party to the wrongful act. If it does not appear, before the defendant can avail himself of it as a defense, it becomes necessary for him to prove the illegal contract to which he was a party and his own illegal conduct in traveling on the Sabbath. But he can no more avail himself of that as a defense than the plaintiff can as a cause of action. Either party whose success depends upon proving his own violation of law, must fail."⁴

¹ Approved in *Hurley v. State*, 30 Tex. App. 333; see: *Ten Hopen v. Walker*, 96 Mich. 236, 55 N. W. 657, 35 A. S. R. 598; *State v. McDuffie*, 34 N. H. 523, 69 A. D. 516; *Graham v. Smith*, 100 Ga. 434, 28 S. E. 225, 62 A. S. R. 323, 40 L. R. A. 506; *Sentell v. New Ore. Ry. Co.*, 166 U. S. 698; *Parker v. Wise*, 27 Ala. 480, 62 A. D. 776; *Brent v. Kimball*, 60 Ill. 211, 14 A. R. 35; *Uhlien v. Cromack*, 109 Mass. 273; *Heisrodt v. Hackett*, 34 Mich. 283, 22 A. R. 529; *Kinsman v. State*, 77 Ind. 132; *Anson v. Dwight*, 18 Ia. 241; *Johnson v. McConnell*, 80 Cal. 545, 22 Pac. 219; *Cantling v. Hannibal Ry. Co.*, 54 Mo. 385, 14 A. R. 476; *Mowery v. Salisbury*, 82 N. C. 175.

² *Woodman v. Hubbard*, 25 N. H. 67, 57 A. D. 310; *Rotch v. Hawes*, 12 Pick. 136, 22 A. D. 414; *Maloney v. Taft*, 60 Vt. 571, 15 Atl. 326, 6 A. S. R. 135; *Devoin v. Mich. Lumber Co.*, 64 Wis. 616, 25 N. W. 522, 54 A. R. 649.

³ *Hall v. Corcoran*, 107 Mass. 251, 9 A. R. 30.

⁴ *Frost v. Plumb*, 40 Conn. 111, 16 A. R. 18; *Fisher v. Kyle*, 27 Mich. 454; *Lane v. Cameron*, 38 Wis. 603; *Crocker v. Gullifer*, 44 Me. 491; *Stewart v. Davis*, 31 Ark.

The rule announced at the beginning of this section has been modified to some extent in favor of the hirer of a horse who, through an honest mistake, takes a different way from that agreed upon. Thus, it has been held that where one hires a horse to drive to a particular place and in returning takes a wrong road by mistake, and upon discovering his mistake takes what he considers the best way back which carries him by a circuit through another town, he is not liable in trover for a conversion.¹ And while it is the general rule as stated that where the owner of a horse lets him for hire for a certain purpose, any material departure from the contemplated use amounts to a conversion for which the bailee will be liable in trover if the horse is injured or destroyed while being so used,² yet the agreement for hire should receive a rational interpretation in determining the manner of the rightful use to which the horse might be put.³ And it has been held in the light of similar reasoning that if one hire a horse to go a given distance but break the contract by going further and the horse is injured, the hirer is not liable unless the injury was the result of driving the excessive distance.⁴ So, where a horse was delivered by the plaintiff to the defendant to be agisted, and the defendant, without authority from the plaintiff, rode the horse a distance of fifteen miles and the horse died a few hours afterward but not in consequence of the riding, plaintiff failed in sustaining an action of trover for the horse.⁵ But it is a general rule that an agister will be liable in trover for any unauthorized use of an animal in his custody.⁶

§ 37. **Liability of Minors for Conversion of Horses.** — Suits for conversion of horses by wrongful use as above discussed are frequently brought against minors. The cases are apparently uniform in holding that infancy is not a defense to such an action.⁷ When an infant has so converted a horse he is responsible therefor in trover although his infancy would protect him from liability for a breach of the contract under which the animal came into his possession.⁸

518, 25 A. R. 576; *Woodman v. Hubbard*, 25 N. H. 67, 27 A. D. 310; *Doolittle v. Shaw*, 92 Ia. 348, 26 L. R. A. 366; see, however, *Whelden v. Chappel*, 8 R. I. 230.

¹ *Spooner v. Manchester*, 133 Mass. 270, 43 A. R. 514.

² 2 Cyc. 312.

³ *Weller v. Camp*, 169 Ala. 275, 52 So. 929, 28 L. R. A. (n. s.) 1106; *Schouler on Bailments*, Arts. 140-141. See *Cullen v. Lord*, 39 Ia. 203.

⁴ *Carney v. Rease*, 60 W. Va. 676, 55 S. E. 729; *Broussard v. Sells-Floto Shows*, Tex. Civ. App., 128 S. W. 439; *Doolittle v. Shaw*, 92 Ia. 348, 26 L. R. A. 366; but see further, *Welsh v. Mohr*, 93 Cal. 371, 28 Pac. 1060; *Malaney v. Taft*, 60 Vt. 571, 15 Atl. 326, 6 A. S. R. 135.

⁵ *Johnson v. Weedman*, 5 Ill. 495.

⁶ *Gove v. Watson*, 61 N. H. 136; *Collins v. Bennett*, 46 N. Y. 490; *Shields v. Dodge*, 14 Lea 356.

⁷ *Ray v. Tubbs*, 50 Vt. 688, 28 A. R. 519; *Towne v. Wiley*, 23 Vt. 355, 56 A. D. 85; *Obiter dictum* in *Eaton v. Hill*, 50 N. H. 235, 9 A. R. 189.

⁸ *Hall v. Corcoran*, 107 Mass. 255.

12. MISCELLANEOUS CHATTELS

§ 38. **When Subjects of Conversion.**—It has been held that mail matter may be converted and thereby become a proper subject for an action of trover;¹ and so may a policy of insurance,² a bank deposit book,³ account books,⁴ and any evidence of indebtedness,⁵ exemplifications of records,⁶ and, as a general rule, any other personal property which may be the subject of ownership, such as manure,⁷ turpentine extracted from trees,⁸ and wagon wheels and axles added as repairs to a wagon under a conditional sale agreement that title should not pass until the repairs were paid for.⁹ And bonds have frequently been converted and trover maintained therefor.¹⁰ But trover will not lie for property which can only be possessed in violation of law, such as counterfeit money,¹¹ liquor license,¹² or game unlawfully exposed for sale.¹³

13. STOLEN PROPERTY

§ 39. **Trover may Ordinarily be Maintained for.**—Public policy and private rights demand the rule now unvarying among the decisions that an owner of property cannot be divested of his ownership except by his own consent or by legal process. And as a person can

¹ *Teall v. Felton*, 1 N. Y. 537, 49 A. D. 352; 12 How. (U. S.) 284, 13 L. Ed. 990, a case in which a postmaster had wrongfully detained mail.

² *Woodworth v. Hascall*, 59 Neb. 124, 80 N. W. 483; *Toplitz v. Bauer*, 161 N. Y. 325, 55 N. E. 1095.

³ *Newman v. Munk*, 36 Misc. (N. Y.) 639.

⁴ *Fullam v. Cummings*, 16 Vt. 697.

⁵ *Jarvis v. Rogers*, 15 Mass. 389.

⁶ *Hudspeth v. Wilson*, 13 N. C. 372, 21 A. D. 344.

⁷ *Pinkham v. Gear*, 3 N. H. 484; *French v. Freeman*, 43 Vt. 93.

⁸ *Branch v. Morrison*, 50 N. C. 16, 69 A. D. 770.

⁹ *Clark v. Wells*, 45 Vt. 4, 12 A. R. 187.

¹⁰ *Kimball v. Billings*, 55 Me. 147, 92 A. D. 581; *Dean v. Turner*, 31 Md. 52; *Chew v. Loucheim*, 80 Fed. 500; *Blackman v. Lehman*, 63 Ala. 547, 35 A. R. 47; *McNamara v. New Melleray*, 88 Ia. 502; *Carver v. Creque*, 46 Barb. 507.

¹¹ *Spalding v. Preston*, 21 Vt. 9, 50 A. D. 68.

¹² *Mier v. Wilkens*, 15 N. Y. App. Div. 97.

¹³ *Averill v. Chadwick*, 153 Mass. 171. It is held that tax receipts may properly become subjects of conversion: *Vaughn v. Wright*, 139 Ga. 736, 78 S. E. 123; copies of accounts: *Fullam v. Cummings*, 16 Vt. 697; a newspaper wrongfully detained by a postmaster: *Teal v. Felton*, 12 How. (U. S.) 284, 13 L. Ed. 990; physician's prescriptions: *R. C. Stuart Drug Co. v. Hirsch*, (Tex.) 50 S. W. 583; a mortgage-deed: *Gleason v. Owen*, 35 Vt. 590; a writ of execution: *Little v. Gibbs*, 4 N. J. L. 211, and *Keeler v. Fassett*, 21 Vt. 539, 52 A. D. 71; a model of an invention: *Smith Egge Co. v. Webster*, 87 Conn. 74, 86 Atl. 763; a deed: *Mowrey v. Wood*, 12 Wis. 413, and *Towle v. Lovett*, 6 Mass. 394, and *Weiser v. Zeisinger*, 2 Yeates (Pa.) 537; a voucher for money on demand: *O'Donoghue v. Corby*, 22 Mo. 393; an insurance policy: *First Nat'l. Bank v. Cleland*, 36 Tex. Civ. App. 478, 82 S. W. 337, and *Himmelman v. Des Moines Ins. Co.*, 132 Ia. 668, 110 N. W. 155, and *Frat. Army of America v. Evans*, 114 Ill. App. 578; a bill of lading: *Alderson v. Gulf, etc. Ry.*, (Tex.) 23 S. W. 617;

convey no better title to property than he has, so a purchaser from one without title gets nothing, for a bad title is not made good by ignorance of the purchaser nor his lack of knowledge of a better title than that of his vendor. And in conjunction with this rule is another principle that, since no title can pass through a thief, a purchaser of stolen property acquires no rights as against the rightful owner and he will be compelled to give up the property unless he has converted it, in which event he will be held in trover for its value.¹ And the bare fact that a thief has possession of property is but *prima facie* evidence of title in him, and upon such appearance of ownership a purchaser must rely at his peril as against the claims of the true owner.² In other words, a purchaser of stolen property cannot defend against the rightful owner on the ground that he was an innocent and *bona fide* purchaser.³

An exception to the foregoing rules is found in the case of stolen money or negotiable securities.⁴ For in this class of property it is the rule of necessity that a *bona fide* holder thereof who has taken the money or negotiable paper in the usual course of business and for a valuable consideration acquires a good title to it. But even in the case of stolen negotiable paper, the transferee thereof must, to acquire a valid title thereto, have both paid a valuable consideration and have taken it *bona fide*; for if circumstances exist which are sufficient to raise a suspicion in the mind of a man of reasonable or ordinary prudence and discretion, such circumstances will operate to prevent acquisition of a better title than that of his vendor.⁵

§ 40. **Owner may Sue Thief or the Person in Possession.** — It therefore follows from the above principles that the owner of stolen property, other than that constituting the exceptions above stated, may, upon finding his property in the hands of one who has purchased it from the thief or the latter's vendee, either replevy the property or bring trover for its conversion against any vendor since

a certificate of membership on a stock exchange: *Olds v. Chicago B. of T.*, 33 Ill. App. 445; a statement of account: *Drake v. Auerbach*, 37 Minn. 505, 35 N. W. 367; stereotype plates: *Lovell v. Shea*, 60 Sup. Ct. 412, 18 N. Y. S. 193, and *Stickney v. Allen*, 10 Gray 352; an unpublished manuscript: *Bateman v. Ryder*, 106 Tenn. 712, 64 S. W. 48, 82 A. S. R. 910; satisfaction of mortgage: *Wyly v. Graigsby*, 10 S. D. 13, 70 N. W. 1049.

¹ *Koch v. Branch*, 44 Mo. 542, 100 A. D. 324.

² *Avery v. Clemons*, 18 Conn. 306, 46 A. D. 323; *Fawcett v. Osborn*, 32 Ill. 411, 83 A. D. 278.

³ *Courtis v. Cane*, 32 Vt. 232, 76 A. D. 174; *Saltus v. Everett*, 20 Wend. 267, 32 A. D. 541; see, however, *Jones v. Mellis*, 41 Ill. 482, 89 A. D. 389; *Breckenridge v. McAfee*, 54 Ind. 141.

⁴ *Barstow v. Mining Co.*, 64 Cal. 388, 1 Pac. 349, 49 A. R. 705; *Newmark, Sales, Sec. 174*; *Fawcett v. Osborn*, *supra*.

⁵ *Vairin v. Hobson*, 8 La. 50, 28 A. D. 125.

its theft, or against any one in possession who contends for such possession against the true owner. And no demand for possession is necessary to be made of even an innocent purchaser of stolen property after he has sold it to another, as in such case it is held that the sale is itself a conversion,¹ and the property having passed beyond the owner's control, his only remedy is trover for its value.²

It has been held that an auctioneer to whom stolen goods had been forwarded by the thief for sale and who sold them and paid the proceeds to the thief, without notice of the theft, was liable to the owner for the value of the goods.³ And while it has been said that a certificate of stock in a corporation is a mere evidence of property,⁴ yet it is very generally held that such certificates may be converted and an action of trover for their value maintained by the real owner.⁵ Thus, a stock-broker who received stock from one who had stolen it, and sold the same and turned the proceeds over to his principal, was held liable to the true owner for its value although he acted in good faith, without notice, and in reliance upon the thief's representations of ownership.⁶ This rule is established upon the theory that if the principal is a wrong-doer, the agent can be only a wrong-doer as he can have no higher authority than that of his principal.⁷ And a purchaser of such stolen property of course gets no title.⁸

§ 41. Trover Not Maintainable for Stolen Money or Negotiable Instruments. — But as noted above, there are exceptions to the general rule in cases where money or negotiable instruments are involved. Thus, it has been held that the sale of a government bond by one who has stolen it, to a purchaser in good faith for value and without notice passes a good title.⁹ And, similarly, it was said that a note transferable by delivery, if not overdue or apparently dishonored may, in the ordinary course of business, in good faith and

¹ *Courtis v. Crane*, 32 Vt. 232, 76 A. D. 174; *Hyde v. Noble*, 13 N. H. 494, 38 A. D. 508.

² *Sharp v. Parks*, 48 Ill. 511, 95 A. D. 565.

³ *Hoffman v. Carow*, 20 Wend. 21, 22 *id.* 285; *Morris v. Hall*, 41 Ala. 511; *Rogers v. Huie*, 1 Cal. 429, 54 A. D. 300; (but see the same case reported in 2 Cal. 571, in which the court seem to have abandoned this doctrine; although the principle is reaffirmed in *Cerkel v. Waterman*, 63 Cal. 34.)

⁴ *Ang. & Ames, Corporations*, 483.

⁵ *Cook, Stock & Stockholders*, § 368; *People v. Griffin*, 38 How. Pr. 475.

⁶ *Swim v. Wilson*, 90 Cal. 126, 27 Pac. 33, 13 L. R. A. 605; citing *Bercich v. Marye*, 9 Nev. 312; *Kimball v. Billings*, 55 Me. 147; see, also, *People v. Bank*, 75 N. Y. 547.

⁷ See *Anderson v. Nicholas*, 28 N. Y. 600, a sale of purloined stock certificate.

⁸ *Barstow v. Mining Co.*, 64 Cal. 388, 1 Pac. 349, 49 A. R. 705, a sale of certificates of stock.

⁹ *Jones v. Nellis*, 41 Ill. 482, 89 A. D. 389.

for a valuable consideration, be transferred so as to vest a good title in the transferee, although stolen from the true owner.¹

§ 42. **Whether Necessary to First Prosecute Thief.** — In actions of trover for the conversion of property which has been stolen, the question has been raised whether the civil action may be maintained prior to the prosecution of the thief. It has been urged that the civil remedy is merged in the felony until conviction of the thief and does not emerge until after that event. And it is held by some courts that for the sake of public justice the private action of trover is superseded and suspended until the public prosecution for the offense has been duly conducted and ended.² While on the other hand it is said that the action of trover for stolen goods may be maintained before the conviction of the person accused of the theft,³ these courts taking the view that to compel the injured party to wait until the prosecution for the offense is ended would be, in most cases, to deny all remedy. And this latter view seems to accord more nearly with a spirit of exact justice to all parties.

14. COLLATERAL SECURITY AND PLEDGED PROPERTY

§ 43. **Duty of Pledgee to Protect.** — The usual subjects of transfer as collateral security are choses in action, certificates of stock in private corporations, bills of lading and warehouse receipts. In fact the term collateral security means the giving of a concurrent security for a principal debt.⁴ The delivery of collateral security vests in the transferee all the rights of the transferer in-so-far at least as it may be necessary to accomplish the purpose of the transfer.⁵ And since the holder, to the extent of his interest therein, is substantially the owner, he must assume the duties of such owner, and must protect the interest of the transferer as well as his own, for the latter has by surrendering the security, lost his right to deal therewith. Collateral security is a pledge of such property as above enumerated as security for a debt; but the term pledge is more expansive as it may include the delivery of any form of personal property to secure the payment of a debt. But whether the delivery be of collateral security or of any other property in pledge, the pledgee owes to the pledgor

¹ *Wheeler v. Guild*, 20 Pick. 545, 32 A. D. 231; see 2 Schouler, *Per. Property*, Sec. 20; also *Worcester Bank v. Dorchester Bank*, 10 Cush. 488, 57 A. D. 120, a suit to recover on a stolen bank bill in which the holder was given judgment.

² *Hutchinson v. Bank*, 41 Pa. St. 42, 80 A. D. 596; but even in this case it is especially said that the private wrong was not merged in the public one.

³ *Pettingill v. Rideout*, 6 N. H. 454, 25 A. D. 473.

⁴ *Munn v. McDonald*, 10 Watts 273.

⁵ *Douglas v. People's Bank*, 86 Ky. 176, 5 S. W. 420, 9 A. S. R. 276.

the duty to see that the property shall not be lost or injured through the negligence or fault of the pledgee.¹ And the interest which the pledgee has in the pledged property does not ordinarily entitle him to use it for his own purposes if such use will in any manner jeopardize the rights of the pledgor or diminish the value of the property.² But, with the exception of the case of corporate shares, the holder of collateral securities is not liable to anybody or for anything except his violation of his duty to the pledgor.

§ 44. *Acts by Pledgee Amounting to Conversion.* — But it is only with cases where the holder of collateral securities or other pledged property has violated his duties to the pledgor with reference to such property that we have here to deal. And it is the rule that for such violation, or for a mis-use or abuse of the property by the pledgee, the pledgor may have his action of trover as for a conversion and recover the value of the property.³ Thus, if the pledgee refuse to return the collateral when the principal debt is paid and the pledge thereby terminated, such refusal constitutes a conversion for which an action will lie,⁴ and the same result follows a failure to return it on account of an unauthorized sale or use of the property by the holder.⁵ And if the property be sold by the pledgee for payment of the principal debt, he is answerable to the pledgor for what it may bring in excess of such debt or such part of the principal debt as the property was pledged to secure,⁶ as he is also answerable for any misappropriation by either himself or his agent.⁷ Likewise, if the holder of collateral securities surrender them to the makers thereof without the consent of his debtor, he renders himself liable as for their conversion.⁸ And since such holder has no right to make a compromise by which the securities are surrendered for less than what is actually due thereon, he will be answerable to the pledgor for so doing.⁹ So, if the holder sell the collateral without authority,

¹ 2 *Parsons, Contracts*, 5th ed. 511; *Lamberton v. Windom*, 12 Minn. 232, 90 A. D. 301; *Pickens v. Yarborough*, 26 Ala. 417, 62 A. D. 728; *Kennedy v. Rosier*, 71 Ia. 761, 33 N. W. 226; *Semple Co. v. Detwiler*, 30 Kan. 386, 2 Pac. 511; *Mills v. Gilbreth*, 47 Me. 320, 74 A. D. 787; *Jones, Pledges*, 510-511.

² *McArthur v. Howett*, 72 Ill. 358; *Stearns v. Marsh*, 4 Denio 227, 47 A. D. 248.

³ *Crocker v. Gullifer*, 44 Me. 491, 69 A. D. 118; *McCalla v. Clark*, 55 Ga. 53; *Cass v. Higenbotam*, 100 N. Y. 248, 3 N. E. 189; *Fay v. Gray*, 124 Mass. 500; *Bryson v. Rayner*, 25 Md. 424, 90 A. D. 69.

⁴ *Kullman v. Greenbaum*, 92 Cal. 403, 28 Pac. 674, 27 A. S. R. 150; *Lawrence v. Maxwell*, 53 N. Y. 19.

⁵ *Bank v. Masonic Hall*, 62 Ga. 271; *Wheeler v. Newbould*, 16 N. Y. 392; *Gay v. Moss*, 34 Cal. 125.

⁶ *Fridley v. Bowen*, 103 Ill. 633; *Hunt v. Nevers*, 15 Pick. 500; *Union Nat'l. Bank v. Roberts*, 45 Wis. 373.

⁷ *Reynolds v. White*, 13 S. C. 5, 36 A. R. 678.

⁸ *Griggs v. Day*, 136 N. Y. 152, 32 N. E. 612, 32 A. S. R. 704.

⁹ *Wood v. Mathews*, 73 Mo. 481; *Union Trust Co. v. Rigdon*, 93 Ill. 458; *Zimpleman v. Veeder*, 98 Ill. 613.

or, having authority, yet sell in a manner not authorized, thereby rendering the sale invalid, the pledgor may hold him liable in trover for the conversion.¹ And authority to the pledgee to sell the securities before maturity of the debt in the event of depreciation of the securities, gives him no right to sell them on finding that corporate stock constituting a part of the securities is not genuine.² It is the duty of a pledgee, in the absence of a special contract, to give reasonable notice to the pledgor of an intention to sell the pledged property after maturity of the debt secured.³ And it is the general rule that where choses in action constitute the securities and the agreement is silent as to the power of the pledgee over them, he has no right upon default in payment of the principal debt to sell them either at public or private sale but must hold and collect them when they become due and apply the proceeds to the payment of the debt secured and return the balance to the pledgor.⁴ And if the securities are sold by the pledgee without authority before maturity of the principal debt, the pledgor may at his election ratify the sale and claim the proceeds or treat the sale as a conversion.⁵ He may likewise hold the pledgee for a conversion if the latter, holding notes as collateral, trade them for bank stock⁶ or for other property.⁷ In one case it was held that authority from a wife to her husband to raise money on her watch did not authorize him to consent to a sale by the pledgee except after notice as required by law, and where he did authorize such sale and it was made without notice, the sale was held a conversion.⁸ And if the sale is made in violation of the agreement of pledge, it is clearly a conversion.⁹

§ 45. **Sale by Pledgee Without Notice.** — As was indicated above, a creditor to whom a pledge of property is made is in duty bound to call for a redemption or give notice of sale before selling the property pledged, where the debt does not mature till a future day certain, and even when it becomes due immediately,¹⁰ and failure to give the required notice constitutes a conversion of the pledged property un-

¹ *Md. Ins. Co. v. Dalrymple*, 23 Md. 224, 89 A. D. 779.

² *National Bank v. Baker*, 121 Ill. 533, 21 N. E. 510, 27 Ill. App. 356, 4 L. R. A. 586.

³ 3 Kent's Com. 581; *Story on Bailments*, 310; *Story on Contracts*, 723; *Story Eq. Jur.* 1008; *Stearns v. Marsh*, 4 Denio 227, 47 A. D. 248; *E. F. Hallack Co. v. Gray*, 19 Colo. 149, 34 Pac. 1000.

⁴ *Joilet Co. v. Scioto Co.*, 82 Ill. 548, 25 A. R. 341; *McLemore v. Hawkins*, 46 Miss. 715; *Wheeler v. Newfould*, 16 N. Y. 392; *Whitaker v. Charleston Co.*, 16 W. Va. 717.

⁵ *Dimock v. U. S. Bank*, 55 N. J. L. 296, 25 Atl. 926.

⁶ *Walley v. Deseret Bank*, 14 Utah 305, 47 Pac. 147.

⁷ *Strong v. Adams*, 30 Vt. 221, 73 A. D. 305.

⁸ *Vanarsdale v. Joiner*, 44 Ga. 173.

⁹ *Hinckley v. Pfeister*, 83 Wis. 64, 53 N. W. 21.

¹⁰ *Stearns v. Marsh*, 4 Denio 227, 47 A. D. 248; *Stevens v. Bank*, 31 Conn. 146; *Morgan v. Dod*, 3 Colo. 551; *Lockett v. Townsend*, 3 Tex. 119, 49 A. D. 736.

less the notice has been waived by a special agreement.¹ And not only must a demand for redemption be made prior to sale, but it has been held that a sale of stock by a pledgee is unlawful and a conversion where the property was pledged for the payment of a demand loan and a reasonable time for payment was not allowed between the time of demand and the date of sale.² So, where the time of payment is indefinite, or has been extended indefinitely, the sale of collateral securities without demand or notice constitutes a conversion.³

Of course, the requirement that the pledgee of personal property must demand payment of the pledgor before sale and give him due notice of the time and place of sale may be waived by a special agreement to that effect.⁴ So, where by the contract of pledge the debt was payable at a fixed time, a sale without notice was expressly authorized, and demand was waived; a sale under such circumstances without notice to the pledgor was held not to constitute a conversion of the property.⁵ And in some states it is held that if the contract is silent as to the requirement of notice, such silence itself constitutes a waiver and no notice is necessary.⁶ But where notes were pledged under an agreement that if the principal debt was not paid when due the pledgee was to make the money out of the notes in the best way he could, it was held that this did not authorize him to sell the notes without demand for payment from the pledgor and notice of the time and place of sale.⁷

§ 46. **Sale by Pledgee must be Public.** — It is further the general rule that pledged property can only be sold at public sale unless there is a special agreement enlarging the power of the pledgee in this respect.⁸ And it has been held that evidence of custom and usage in a city to sell notes and drafts pledged, after demand and notice that they would be sold at private sale, is inadmissible as a defense to an action of trover for the conversion of the notes which were sold at private sale.⁹ And authority to the pledgee of stock to sell it at

¹ *Gay v. Moss*, 34 Cal. 125; *Warring v. Gaskill*, 95 Ga. 731, 22 S. E. 659; see *Baker v. Drake*, 66 N. Y. 518, 23 A. R. 80.

² *Genet v. Howland*, 45 Barb. 560.

³ *Greer v. Lafayette Bank*, 128 Mo. 559, 30 S. W. 319; *Gillett v. Whiting*, 120 N. Y. 402, 24 N. E. 790.

⁴ *Chouteau v. Allen*, 70 Mo. 290.

⁵ *Harris v. Thomas*, 37 Ill. App. 517; *Robinson v. Hurley*, 11 Ia. 410, 79 A. D. 497.

⁶ *McDowell v. Steel Works*, 124 Ill. 491, 16 N. E. 854; *Maryland Gas Co. v. Dalrymple*, 25 Md. 242, 89 A. D. 779.

⁷ *Goldsmidt v. M. E. Church*, 25 Minn. 202.

⁸ *Rankin v. McCullough*, 12 Barb. 103; *Sharpe v. Bank*, 87 Ala. 644, 7 So. 106; *Ind. Railway Co. v. McKernan*, 24 Ind. 62; *Diller v. Brubaker*, 52 Pa. 498, 91 A. D. 177.

⁹ *Wheeler v. Newfould*, 16 N. Y. 392.

the board of brokers does not render valid a secret sale of such stock.¹

§ 47. **Pledgee Cannot Buy at his Own Sale.** — In the absence of an agreement between the pledgee and pledgor that the former may become the purchaser of the pledged property in the event of a sale thereof for the principal debt, the sale of the property to the pledgee, whether in his name or in the name of another for his benefit, is voidable; and the pledgor may regard the sale as a conversion of the property,² or may treat it as having no effect upon his rights, leaving him still the owner of the property.³ Thus, a sale by a bank of stock held by it in pledge to one of its own directors has been held a violation of the duties owed to the pledgor which would render the pledgee liable for the value of the securities.⁴ And it has been held that the pledgee is liable in trover if he take in his own name a conveyance of the securities held by him.⁵

On the other hand, it is said by possibly a greater line of authorities that a purchase by a pledgee of the property pledged is not void but voidable; the pledgor has the option to affirm or repudiate the sale. If he affirm the sale, his action validates it and passes title to the pledgee and entitles the pledgor to the amount bid at the sale; but if he repudiate it, the sale is void, and the pledgee holds the collaterals under the original agreement in the same manner as if no sale had been made, and cannot be charged with a conversion until he parts with possession or control over the securities.⁶ And a pledgee is not liable in trover for taking in his own name a judgment of foreclosure on a pledged mortgage.⁷

§ 48. **What Does Not Amount to a Conversion by Pledgee.** — We shall now set forth some instances in which the acts of a pledgee have been held not to constitute a conversion of the pledged property. It must be remembered that the wrongful or unauthorized use or disposition of pledged property by the pledgee so as to render him unable to return it to the pledgor upon payment of the principal debt is a conversion of the property; but so long as nothing is done to deprive the pledgor of his right to redeem upon payment of his debt and to have his property thereupon returned, there is no con-

¹ *Dykers v. Allen*, 7 Hill 497, 42 A. D. 87; see *Brass v. Worth*, 40 Barb. 648.

² *Freeman v. Harwood*, 40 Me. 195; *Davis v. Funk*, 39 Pa. St. 243, 80 A. D. 519.

³ *Stokes v. Frazier*, 72 Ill. 428; *Canfield v. Minn. Assoc.*, 14 Fed. 801; *Bryson v. Rayner*, 25 Md. 424, 90 A. D. 69.

⁴ *Sitgreaves v. Farmers Bank*, 49 Pa. 359.

⁵ *Kelley v. Matlock*, 85 Cal. 122, 24 Pac. 642.

⁶ *First Nat'l. Bank v. Rush*, 56 U. S. App. 556, 85 Fed. 539, 29 C. C. A. 333; *Bryan v. Baldwin*, 52 N. Y. 232; *Earle v. Grant*, 14 R. I. 228.

⁷ *McArthur v. McGee*, 114 Cal. 126, 45 Pac. 1068.

version. It is accordingly said that the pledgee may assign or transfer his interest in the pledged property, and such cannot injure the pledgor as he would have the same right to redeem as before.¹ Nor does it amount to a conversion for a pledgee to transfer pledged stock and take certificates back in his own name with a power of attorney to transfer them at will.² And a pledgee of stock is not liable for their conversion where he has sold stock of the same kind and cannot tell whether it was the identical stock pledged, where the shares are not distinguishable from any other similar number of shares of the same stock.³ And a pledgee, especially if he be a broker, cannot be held in trover for disposing of shares of stock pledged so long as he has on hand an equal number that he may deliver when the principal debt is paid.⁴ Or, in other words, it is held that the identical shares need not be returned to the pledgor.⁵ But contrary to this, it has been said that if a certificate of stock in a corporation has been transferred by the pledgee to a creditor of his own, the pledgor may treat this as a conversion, and the fact that the pledgee has a greater number of shares standing to his own credit on the books of the corporation is immaterial.⁶ And, again, that where a pledgor of stock deposited as collateral is able to specifically designate the shares deposited, he is entitled to have the identical shares returned, or in default of such return to recover their value in trover.⁷ These courts rest their decision on the requirement that the shares must be capable of identification.⁸

Where certificates of stock are transferred in pledge by indorsement in blank, a *bona fide* purchaser from a subsequent pledgee may hold them without being guilty of a conversion.⁹ So, a pledgee of notes is not liable for their conversion where he transfers them together with a note evidencing the principal debt, to one who converts them to his own use.¹⁰ And the sale at public auction of collateral notes has been held not to be a conversion thereof where the sale was made under authority to collect the notes.¹¹

¹ Talty v. Freedman's Co., 93 U. S. 321, 23 L. Ed. 886; Belden v. Perkins, 78 Ill. 449; Drake v. Cloonan, 99 Mich. 121, 57 N. W. 1098.

² Heath v. Griswold, 5 Fed. 573; see Day v. Holmes, 103 Mass. 306; Donnell v. Wyckoff, 49 N. J. L. 48, 7 Atl. 672.

³ Berlin v. Eddy, 33 Mo. 426; Skiff v. Stoddard, 63 Conn. 198, 26 Atl. 874, 21 L. R. A. 102; see Hubbell v. Drexel, 11 Fed. 115; Hayward v. Rogers, 62 Cal. 372.

⁴ Boylan v. Huguet, 8 Nev. 345; Caswell v. Putney, 120 N. Y. 153, 24 N. E. 287.

⁵ Atkins v. Gamble, 42 Cal. 86, 10 A. R. 282; Horton v. Morgan, 19 N. Y. 170, 75 A. D. 311.

⁶ Fay v. Gray, 124 Mass. 500.

⁷ Allen v. Dubois, 117 Mich. 115, 75 N. W. 443, 72 A. S. R. 557.

⁸ See to the same effect Wilson v. Little, 2 N. Y. 443, 51 A. D. 307.

⁹ Jarvis v. Rogers, 15 Mass. 389.

¹⁰ Goss v. Emerson, 23 N. H. 42.

¹¹ Fraker v. Reeve, 36 Wis. 85.

§ 49. Acts or Conduct of Pledgor May Amount to Waiver of the Conversion. — But in any case where a conversion of pledged property is shown, the pledgor may waive the conversion, or, rather, he may waive his right to hold the pledgee in trover for the conversion. Waiver is the voluntary relinquishment of a known right.¹ So that, if a pledgee has so violated his duties as to render himself liable to the pledgor for a conversion, the latter may so act as to show an intention to forego his right of action for the conversion, in which event he is held to have waived it. Thus, where stock was sold by a broker who reported the sale to his principal and the latter expressed no dissatisfaction with it, he was held to be precluded from claiming damages on account of the sale.² And where pledged property is sold at private instead of public sale and the pledgor, with knowledge of the facts, accepts the proceeds of the sale, he cannot hold the pledgee for a conversion of the property.³ So, acquiescence and long silence after full knowledge of a wrongful sale of pledged property may be sufficient to show an abandonment of the right to treat the sale as a conversion.⁴ And if the pledgor, with knowledge of the wrongful sale, presents to the pledgee a statement of the amount due him and offers to receive it in satisfaction, such conduct amounts to a waiver of the conversion.⁵ But where the pledgee sold more of the pledged property than was necessary to pay the principal debt, the pledgor did not waive his right to damages by accepting the excess price of the property sold.⁶ And while it is said that mere silence irrespective of the lapse of time may not amount to a waiver of the tort in the sale of pledged property to the pledgee himself, yet where the pledgor commenced to treat with the pledgee for the purchase of a part of the property thus sold, with knowledge of his rights, the pledgor was held to have waived the irregularity in the sale and thereby made it valid.⁷

§ 50. When Pledgor Must Tender Payment and Demand the Property Prior to Trover. — In cases where there has been a conversion of pledged property by a wrongful sale or use of same, the question arises whether the pledgor must tender to the pledgee payment of the principal debt and demand a return of his property before he can maintain trover for the conversion. The rule deduced from the cases seems to be almost universally applied that where the

¹ Bowers on Waiver, Sec. 1, and citations; see, *post*, Chapter on "Waiver of Conversion."

² *Galigher v. Jones*, 129 U. S. 193, 32 L. Ed. 658.

³ *Hamilton v. State Bank*, 22 Ia. 306.

⁴ *Marsh v. Whitmore*, 21 Wall. 178, 22 L. Ed. 482.

⁵ *Butts v. Burnett*, 6 Abb. Pr. N. S. 302.

⁶ *Fitzgerald v. Blocher*, 32 Ark. 742, 29 A. R. 3; and see *Smith v. Savin*, 69 Hun 311.

⁷ *Hill v. Finnegan*, 77 Cal. 267, 19 Pac. 494.

pledgee has sold or transferred the pledged property so as to make it impossible for him to return it, it is unnecessary for the pledgor to offer to pay the debt or demand a return of the property as a preliminary to an action against the pledgee for a conversion of the property.¹ And it is likewise held that where the pledgor is sued on the principal debt he can maintain a counter-claim against the pledgee, and a tender of payment is not essential where the pledgee has sold the collaterals to a third person who had transferred them beyond the control of the pledgee.² And the defense of a conversion of the collaterals may be made to an action on the main debt without demanding a return of the securities or tendering payment of the debt.³ But where collaterals had been sold by the pledgee the pledgor was held barred from an action for their value when he had waited for some time after the sale and until the collaterals had risen in value and he had made no tender for the purpose of redeeming them.⁴ And a tender after a regular sale of the pledged property comes too late.⁵

§ 51. **What Acts by Third Parties Amount to Conversion.** — In some cases third parties may be guilty of converting pledged property. Their liability usually depends upon the *bona fides* of the transaction; for the rule is that a purchaser in good faith of pledged property from the pledgee succeeds to all the rights of the original owner and the latter can have no action against such purchaser for the conversion.⁶ But such purchaser must have bought the property without notice of the rights of the pledgor in order to be protected.⁷ And when the property has come to the purchaser without such notice and for value, he is not guilty of converting it by selling it even though the pledgee had exceeded his authority or broken his agreement with the pledgor.⁸ And in such a case the pledgor would not estop himself from suing the pledgee in trover by buying the property back from the purchaser.⁹ But if the pledgee give away the pledged property, or transfer it without a valuable consideration and by a merely colorable sale, the purchaser acquires no more rights in the property than the pledgee had.¹⁰

¹ Van Arsdale v. Joiner, 44 Ga. 173; Work v. Bennett, 70 Pa. 484; Luckett v. Townsend, 3 Tex. 119, 49 A. D. 723; Sheridan v. Presas, 18 Misc. 180 (N. Y.); Wally v. Bank, 14 Utah 305, 47 Pac. 147.

² First Nat'l. Bank v. Rush, 56 U. S. App. 556, 85 Fed. 539, 29 C. C. A. 333.

³ Warring v. Gaskill, 95 Ga. 731, 22 S. E. 659.

⁴ Lacombe v. Forstall, 123 U. S. 562, 31 L. Ed. 255.

⁵ Loomis v. Stave, 72 Ill. 623; see First Nat'l. Bank v. Mings, 11 Tex. Civ. App. 302, 32 S. W. 178.

⁶ Williams v. Ashe, 111 Cal. 180, 43 Pac. 595.

⁷ Rogers v. Ins. Co., 8 N. J. Eq. 167; Belden v. Perkins, 78 Ill. 449.

⁸ Felt v. Heye, 23 How. Pr. 359.

⁹ Hilgert v. Levin, 72 Mo. App. 48.

¹⁰ Norton v. Baxter, 41 Minn. 146, 42 N. W. 865, 4 L. R. A. 305.

CHAPTER IV

WHO MAY BE GUILTY OF CONVERSION

1. PRINCIPALS

- § 52. Relation of principal and agent.
- § 53. Principal is liable for conversion by agent.

2. AGENTS

- § 54. Agents in general.
- § 55. Agent, though innocent, is liable.
- § 56. Same subject; illustrations.
- § 57. Brokers and factors; liability of.
- § 58. Exceptions in some cases.
- § 59. Auctioneers; liable for wrongful sale.
- § 60. Same subject; knowledge of wrong.
- § 61. Conversion of principal's property.
- § 62. Agent liable for disobeying instructions.
- § 63. Difference between conversion by agent and breach of trust.

3. OFFICERS

- § 64. Conversion by officers.
- § 65. Officer levying on property of wrong person.
- § 66. Same subject; wrongful attachment.
- § 67. Liability of persons directing levy.
- § 68. Judgment plaintiff assisting in wrongful seizure.

4. PLEDGEES

- § 69. Who are pledgees.
- § 70. Pledgee has sufficient interest to sue for conversion.
- § 71. What acts of pledgee amount to conversion.
- § 72. Duties of pledgee as to property pledged.
- § 73. Unauthorized sale or re-pledge by pledgee.
- § 74. Same subject; how sale to be made.
- § 75. Same subject; who may buy pledged property.
- § 76. Whether tender by pledgor necessary.
- § 77. Remedies of pledgor for conversion of property pledged.
- § 78. Statutory rights of pledgors and pledgees.

5. BAILEES

- § 79. Duties and liabilities of bailees, in general.
- § 80. Conversion by mis-use of property bailed.
- § 81. What deviation from line of travel amounts to conversion by hirer of horse.
- § 82. Mis-use of hired chattel.
- § 83. Liability of infant bailee.
- § 84. Wrongful sale of bailed property by bailee.
- § 85. Same subject; bailor's right of possession.
- § 86. Delivery by bailee to unauthorized person.

WHO MAY BE GUILTY OF CONVERSION

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| <p>§ 87. Wrongful delivery by gratuitous bailee.</p> <p>§ 88. Delivery by bailee to one whom he found in possession.</p> <p>§ 89. Where goods taken from bailee by officer.</p> <p>§ 90. Where contract of bailment is void; hiring horses on Sunday.</p> <p>§ 91. Failure or refusal of bailee to deliver or return property.</p> <p>§ 92. Same subject; reasonable refusal no conversion.</p> <p>§ 93. Same subject; what refusal amounts to conversion.</p> <p>6. EXECUTORS AND ADMINISTRATORS</p> <p>§ 94. When liable as such and when individually.</p> <p>7. CARRIERS OF GOODS</p> <p>§ 95. Duties of carriers, in general.</p> <p>§ 96. Same subject.</p> <p>§ 97. Deviation by carrier from regular or authorized route.</p> <p>§ 98. Failure or refusal of carrier to deliver goods.</p> <p>§ 99. Same subject; amounts to a conversion.</p> <p>§ 100. Same subject; delivery to consignee before notice of claim of another.</p> <p>§ 101. Duty of carrier as to conflicting claimants of goods.</p> <p>§ 102. Same subject; applying rule of <i>caveat emptor</i>.</p> <p>§ 103. Same subject; qualified refusal is no conversion.</p> <p>§ 104. Burden of proof.</p> <p>§ 105. Wrongful delivery by carrier.</p> <p>§ 106. Same subject; delivery to be according to bill of lading.</p> <p>§ 107. Carrier must demand production of bill of lading.</p> <p>§ 108. What amounts to wrongful delivery by carrier.</p> <p>§ 109. Fault of consignor or consignee excuses mis-delivery by carrier.</p> <p>§ 110. Mis-delivery by carrier induced by fraud.</p> <p>§ 111. Same subject.</p> | <p>§ 112. Same subject; carrier's right to rely on appearances of ownership.</p> <p>§ 113. Custom regulating delivery by carriers.</p> <p>§ 114. Payment of freight as condition precedent to action.</p> <p>§ 115. Demand by carrier of payment of charges other than freight.</p> <p>§ 116. Where carrier receives stolen goods for carriage.</p> <p>§ 117. Demand for unreasonable freight charges.</p> <p>§ 118. Surrender of goods under legal process.</p> <p>§ 119. Same subject; process must be fair on its face.</p> <p>§ 120. Same subject; where process invalid.</p> <p>§ 121. Same subject; carrier must give notice to owner.</p> <p>§ 122. Miscellaneous instances of conversion by carrier.</p> <p>8. MORTGAGOR OR MORTGAGEE</p> <p>§ 123. By mortgagor or his successor in interest.</p> <p>§ 124. Use by mortgagor no conversion, when.</p> <p>§ 125. Trover against those claiming under mortgagor.</p> <p>§ 126. Same subject; where interest of mortgagor levied upon.</p> <p>§ 127. Same subject.</p> <p>§ 128. Conversion of mortgaged chattels by third persons.</p> <p>§ 129. By mortgagee or his successor in interest.</p> <p>§ 130. Conversion by irregular foreclosure of mortgage.</p> <p>9. CORPORATIONS</p> <p>§ 131. General rules relating to corporations.</p> <p>§ 132. Transfer to wrongful holder of shares.</p> <p>§ 133. Corporation must demand surrender of certificate.</p> <p>§ 134. Corporation is trustee for stockholders.</p> <p>§ 135. Mistake in transferring stock.</p> <p>§ 136. Corporation refusing to enter name of holder of shares.</p> |
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WHO MAY BE GUILTY OF CONVERSION

- § 137. Third person causing wrongful refusal to transfer stock.
- § 138. Where corporation has lien against stock.
- § 139. When may refuse to transfer stock.
- § 140. Same subject.
- § 141. Where certificate fails to disclose lien of corporation.
- § 142. Where certificate represents stock fully paid.
- § 143. Refusal of corporation to issue stock.
- § 144. Conversion of shares or certificates.
- § 145. Same subject.
- § 146. Same subject.
- § 147. Either certificate or shares may be converted.
- § 148. Same subject.
- § 149. Illustrations of the rule.
- § 150. Irregular sale of stock for unpaid assessments.
- § 151. Remedy of stockholder for wrongful sale.
- § 152. Agreement of parties may preclude trover.
- § 153. Conversion of trust property.
- § 154. Sale of stock held in trust.
- § 155. Conversion of special deposits by banks.

10. MUNICIPAL CORPORATIONS

- § 156. Liability for torts in general.
- § 157. Distinction between municipal, and quasi-municipal corporations.
- § 158. To create liability act must be within scope of power.
- § 159. *Ultra vires* acts.
- § 160. What duties imposed on municipal corporation.
- § 161. Same subject.
- § 162. Attempted enforcement of illegal ordinance.
- § 163. Whether liability of municipal corporation implied.
- § 164. Unlawful acts, but within scope of municipal power.
- § 165. Same subject; acts of agent in good faith.
- § 166. Same subject.
- § 167. Same subject.
- § 168. Same subject; illustrations.
- § 169. Rule of *respondeat superior*.

- § 170. Same subject.
- § 171. Same subject; when city liable for acts of officers.
- § 172. Same subject.
- § 173. Where city manages property for profit.
- § 174. Liability of city for personal injuries.
- § 175. Negligent performance of ministerial duties.
- § 176. Ratification of wrongful act of officers.
- § 177. Conversion in general.
- § 178. Whether municipal corporation liable in trover.
- § 179. Illustrations of conversion.
- § 180. Abatement of nuisances.
- § 181. Same subject.
- § 182. Same subject; what are nuisances.
- § 183. Same subject.
- § 184. Same subject.
- § 185. Removal of structures to prevent fire.
- § 186. Same subject; whether exercise of eminent domain.
- § 187. Same subject.
- § 188. Same subject.
- § 189. Same subject; where statute allows compensation.
- § 190. Same subject; law of necessity.
- § 191. Same subject; where building would have burned at all events.

11. PARTNERS

- § 192. Each partner is agent of firm.
- § 193. Each partner liable for torts of firm.
- § 194. Firm liable for conversion by partner.
- § 195. Liability of partners is joint and several.
- § 196. Acts of partner in scope of firm business.
- § 197. Illustrations of conversion for which firm liable.
- § 198. Same subject.
- § 199. Same subject.
- § 200. Conversion of bailed property.
- § 201. Misapplication of property intrusted to partner.
- § 202. Tort of partner outside scope of firm business.

- § 203. Where special authority given one partner.
- § 204. Same subject; where firm receives benefit.
- § 205. Same subject; knowledge of non-participating partner must be shown.

12. CO-TENANTS

- § 206. Liability of; in general.
- § 207. One claiming to be sole owner of joint property.
- § 208. Sale of the joint property.
- § 209. Same subject.
- § 210. Same subject; whether sale amounts to destruction.
- § 211. Same subject.
- § 212. Same subject.
- § 213. Same subject; sale of crops.
- § 214. Wrongful purchase by defendant.
- § 215. Rule denying trover for a sale.
- § 216. Same subject.
- § 217. Same subject.
- § 218. Same subject.
- § 219. Conversion by destruction.
- § 220. Merely retaining possession, no conversion.
- § 221. Property held on shares.
- § 222. Removal of the common property.
- § 223. Same subject.
- § 224. Same subject; chattels attached to realty.
- § 225. Removal and conversion of crops.
- § 226. Permitting loss of property.
- § 227. Change from personal to real property.
- § 228. Refusing to segregate.
- § 229. Mis-use of the property.
- § 230. Changing form of property.
- § 231. Wrongful intermingling of chattels.
- § 232. Excluding co-owner from possession.

- § 233. Same subject; whether property severable.

13. PURCHASERS FROM UNAUTHORIZED VENDORS

- § 234. General principles.
- § 235. Innocent purchaser cannot hold against true owner.
- § 236. Owner divested of property only by own act.
- § 237. Possession not evidence of right to sell chattels.
- § 238. Purchasers from pledgees and bailees.
- § 239. Same subject.
- § 240. Same subject; rule of *caveat emptor* applied.
- § 241. Purchaser from co-tenant.
- § 242. Purchaser from agent.
- § 243. Where sale in usual course of trade.
- § 244. Where agent violates instructions.
- § 245. Agent merely intrusted with possession.
- § 246. Purchasers from vendees in conditional sales.
- § 247. Same subject; no title passes.
- § 248. Purchasers from fraudulent vendees.
- § 249. Where owner clothed vendee with indicia of ownership.
- § 250. Where contract of sale void.
- § 251. When purchaser has paid value.
- § 252. Stolen property.
- § 253. Stolen negotiable paper.
- § 254. Purchaser acquires no title from thief.

14. INFANTS

- § 255. Where wrong is non-performance of contract.
- § 256. Liability as bailees.

1. PRINCIPALS

§ 52. **Relation of Principal and Agent.** — A discussion of the liability of a principal for an act of his agent constituting a conversion involves a setting forth of some of the elementary principles of the law of principal and agent, especially as applied to the agent's torts

in general. If one employ another to do for him certain things, he is responsible for the manner in which those things are done, and for the torts of the agent committed by him in the prosecution of the business intrusted to him. And within the scope of the employment, the principal is liable to parties injured, equally with the agent. In such cases the principle of *respondeat superior* applies. The liability of the principle does not depend upon whether the agent had authority to do the act which resulted in the injury. The basis of the liability is that the act was done by the agent while in the line of his employment, and in such a case the act of the agent is the act of the principal. *Qui facit per alium, facit per se*. And from this fact it must be apparent that the principal is not liable for every wrongful act of his agent; that he is not responsible for any act or omission of his agent which is not connected with the business in which he serves him and does not happen in the course of his employment. But the rule of *respondeat superior* does not depend upon whether the agent has departed from instructions of his principal, for the agent may have willfully disobeyed the instructions and yet by his act rendered the principal liable. Neither does the liability of the principal for the acts of his agent depend upon the motive of the agent or his good or evil intentions; for by the modern rule the principal is responsible for even the willful, wanton or malicious acts of his agent, the only proviso being that the acts must have been committed in the scope, or apparent scope, of his authority. If there has been an express direction of the principal to the agent to do the act complained of, of course the principal is liable for the results. And the principal may render himself liable by ratification of a wrongful act of his agent or by acceptance of the benefits of the act with full knowledge of the facts.

§ 53. **Principal is Liable for Conversion by Agent.** — My research has disclosed but few cases in which the principal was sought to be held in trover for a conversion of property by his agent. Perhaps the reason is that the agent is himself liable, as will be shown in the next succeeding article. But without doubt the general rules fixing liability on the principal for the agent's torts as above announced apply to cases of conversion. Thus, where goods were wrongfully detained by an agent, his principal was held liable in trover for their conversion.¹ In the case cited, an employee of the state prison had refused to deliver plaintiff's goods, which refusal was by direction of one of the inspectors. The inspector was held liable for the conversion. In another case an agent lodged a slave in the work-house as

¹ Shotwell v. Few, 7 Johns. 302.

the property of his principal, and the slave remained there for some time. The principal, with knowledge of the fact, made no disclaimer of the ownership, and such was held a conversion by the principal.¹ This latter case was doubtless decided upon the theory that by ratification the principal adopted the act of the agent as his own. But in another case an agent refused to deliver goods on the ground that he had no authority, and his principal later approved the act for the same reason; and it was held that the approval of the act did not render the principal liable for a conversion of the goods.²

2. AGENTS

§ 54. **Agents in General.** — An agent who for his principal wrongfully takes, detains or sells the goods of another is personally liable in replevin, trover or other action for the tort, even though he acted in good faith, supposing the goods to be his principal's, and although he has delivered the goods to his principal. The fact that the agent acted in good faith supposing that his principal had a right to have done what was done is no defense. He who intermeddles with the property not his own must see to it that he is protected by the authority of one who is himself, by ownership or otherwise, clothed with the authority he attempts to confer.³ And the agent cannot plead in defense that he acted under the direction of his principal,⁴ or that he derived no personal advantage from the wrong done,⁵ or that he intended no wrong;⁶ for the gist of conversion is the depriving the owner of his property and it is said that in the act of doing this the principal is a wrong-doer and the agent is a wrong-doer also.⁷

§ 55. **Agent, though Innocent, is Liable.** — Certain bank notes were placed on deposit as a special deposit in a bank. The cashier converted them, and it was held that he was personally liable in trover for their value.⁸ Similarly, certain mining stock was deposited with the treasurer of a corporation to be delivered to the owner upon the performance of certain work by him. Upon the treasurer's fraudu-

¹ *Miller v. Reigue*, 2 Hill 592 (S. C.); see also, *Ward v. Carson R. W. Co.*, 13 Nev. 44.

² *Mount v. Derick*, 5 Hill 455.

³ *Mechem, Agency*, 573-574.

⁴ *Everett v. Coffin*, 6 Wend. 603, 22 A. D. 551; *Baker v. Wasson*, 53 Tex. 157; *Lee v. Mathews*, 10 Ala. 682, 44 A. D. 498.

⁵ *Koch v. Branch*, 44 Mo. 542, 100 A. D. 324; *Weber v. Weber*, 47 Mich. 569, 11 N. W. 389.

⁶ *Williams v. Wall*, 60 Mo. 322.

⁷ *McPheeters v. Page*, 83 Me. 234, 22 Atl. 101, 23 A. S. R. 772; citing *Kimball v. Billings*, 55 Me. 147, 92 A. D. 581.

⁸ *Coffin v. Anderson*, 4 Blackf. 395.

lently refusing to surrender the stock it was held that trover could be maintained against him.¹ In another case an agent sold for his principal certain bonds which had been stolen from the owner and received by the principal with knowledge of the theft. The agent had no knowledge that his principal was not the true owner, but he was held liable for the conversion of the bonds.² The application of the rule holding an agent guilty of conversion when acting solely in the interest of his principal may, and frequently does work an injustice upon an innocent person; but the answer to this is that where one of two innocent persons must suffer by the wrong of another, the one who enables such other to commit the wrong must bear the consequences.³

§ 56. **Same Subject; Illustrations.** — And the hardship worked on an innocent agent in selling and disposing of goods which he in good faith supposed he had a right to sell or dispose of in the line of his employment by his principal, has been the cause of his procuring judicial release from liability for such acts in at least one state. In Minnesota the rule of law has been held to be that an agent or servant who, acting solely for his principal or master and by his direction, and without knowledge of any wrong involved or being guilty of any gross negligence in not knowing of it, disposes of or assists the principal in disposing of property which the latter had no right to dispose of is not liable for a conversion.⁴ But this case we believe to be out of harmony with the current of authority. It is said, however, that if an agent is called upon for the delivery of goods intrusted to him by his principal, he is not required to deliver them at once, but may decline to surrender them until he has had a reasonable time to communicate with his principal without being guilty of converting the goods.⁵ But it was held in the same case that if the agent unqualifiedly refused to surrender the goods, either before or after communicating with his client or principal, he will be guilty of conversion if it be shown that his principal was not entitled to possession of the goods. An agent who merely carries and delivers to his principal goods bought by the latter at an unauthorized sale is not guilty of conversion where he has no knowledge of the want of authority to sell.⁶

¹ McDonald v. McKinnon, 92 Mich. 254, 52 N. W. 303.

² Kimball v. Billings, 55 Me. 147, 92 A. D. 581; Story on Agency, Sec. 311-312; Edgerly v. Whalan, 106 Mass. 307; Gage v. Whittier, 17 N. H. 312.

³ Sprights v. Hawley, 39 N. Y. 441, 100 A. D. 452.

⁴ Lenthold v. Fairchild, 35 Minn. 100, 27 N. W. 503, and 28 N. W. 218.

⁵ Singer Co. v. King, 14 R. I. 511.

⁶ Burditt v. Hunt, 25 Me. 419, 43 A. D. 289.

§ 57. **Brokers and Factors; Liability of.** — The liability of brokers and factors when charged with a conversion of personalty has in a measure been discussed in an earlier section.¹ The general rules hereinbefore adverted to as applying to agents in general apply equally here. Thus, it has been held that if a stock-broker receive stock from one who has stolen it, and sells it, paying the proceeds over to his principal, he is liable to the true owner for the value of the stock even though he acted in good faith and in reliance upon the representations of the thief.² This is so because if the principal is a wrong-doer, so is the agent. And the same rule applies where the broker buys and ships to his principal property which his vendor had no right to sell.³

§ 58. **Exceptions in Some Cases.** — But a case decided in Tennessee and later cited with apparent approval by other authorities holds to a doctrine so clearly contradictory of the above principles that I think it well to give some extended notice to it. The courts of that state had held to the above stated principles,⁴ until the decision of the case of *Roach v. Turk*.⁵ The latter case was one arising on the fact that the plaintiff had sent cotton to his agent with directions to forward it to defendants who were commission merchants to be sold on the plaintiff's account; the agent shipped it to the defendants in his own name and as his property, and they sold it according to his instructions and remitted the proceeds to him. The defendants acted in good faith and without knowledge of plaintiff's title. The court held under these facts that the defendants were not liable in trover for the conversion of the cotton. In the course of their opinion, the court say: "We know it is sometimes loosely said in cases that any unauthorized act of dominion over the property of another is a conversion, but on looking into the facts of these cases it will be found that it was always meant that such unauthorized dominion or control had in it the element of an assertion of adverse right or claim to that of the true owner, and without this, there can be, on sound principle, no conversion. Upon this reasoning and the authorities we have cited it is clear that while the agent, Ware, had no power to sell or convey the title to the cotton, and could communicate none to the defendants, Roach & Co., and while the cotton in the hands of Roach & Co., or their vendees, might be recovered by the plaintiffs; yet we hold

¹ §§ 42-50 *ante*.

² *Swim v. Wilson*, 90 Cal. 126, 27 Pac. 33, 25 A. S. R. 110, 13 L. R. A. 605.

³ *Williams v. Merle*, 11 Wend. 80, 25 A. D. 604.

⁴ *Taylor et al. v. Pope*, 5 Col. 413 (Tenn.).

⁵ 9 Heisk. 708, 24 A. R. 360, followed in *Frizzell v. Rundle*, 88 Tenn. 396, 12 S. W. 918.

that the mere act of selling the cotton as factors, with no knowledge of the plaintiff's title, could not make Roach & Co. liable for a conversion. We cannot admit the correctness of the deductions in the 5th Coldwell case (*Taylor v. Pope*) drawn from cases holding that the agent, not having power to sell, can communicate no title to a vendee, and it therefore follows that an innocent factor, with no knowledge of the agent's violation of his trust, who in the exercise of ordinary prudence and caution sells the property placed in his hands by one who had possession of, and therefore a *prima facie* title to it, is guilty of a conversion and liable to the true owner, nothing more appearing. We hold that in order to make the factor liable, a demand must be made while the property or its proceeds is in his hands, or notice of the owner's title, or want of title on the part of the party placing it in his hands, must be brought home to him, and thus fix upon him a wrongful assertion of dominion and control over another's property and in defiance of his rights. We therefore overrule the opinion of the court in the case of *Taylor v. Pope* as unsound in principle and unsustained by authority. The factor, in a case like the one before us, has no knowledge of the title of the plaintiff, nor has he the means of knowledge. He has no means of knowing from whom the party who sends the cotton to him has obtained it. It has nothing about it by which its former owner can be traced. He ought not to be required to examine and verify the title to all cotton or other produce shipped to him for sale. This would burden trade too heavily."

The weakness of the above argument, in my opinion, is that it admits the existence of all the ingredients of a complete conversion, but refuses to declare the logical result. It has the ear-marks of law made for that special case. It is admitted that the agent had no right to sell or convey the cotton and that the factors had no such right; and yet they sold it to the damage of the owner. It may as well be said that a live-stock broker could sell a stolen horse and not be liable to the owner. Yet this case is cited as an authority,¹ although it is opposed to the current of the decisions.²

§ 59. Auctioneers; Liable for Wrongful Sale. — An auctioneer, the same as any other person, may be guilty of converting the property he sells, and like any other agent may be held in trover even

¹ *Mechem, Agency*, 961.

² See: *Flannery v. Harley*, 117 Ga. 483, 43 S. E. 765; *Robinson v. Bird*, 158 Mass. 357, 33 N. E. 391; *Thompson v. Irwin*, 76 Mo. App. 418; *Kempner v. Thompson*, 100 S. W. 351 (Tex.); *Kearney v. Clutton*, 101 Mich. 106, 59 N. W. 419; *Saltus v. Everett*, 20 Wend. 263, 32 A. D. 541; *Velsian v. Lewis*, 15 Ore. 184, 16 Pac. 631, 3 A. S. R. 184; *Bericch v. Mayre*, 9 Nev. 312; *Stevenson v. Valentine*, 27 Neb. 338, 43 N. W. 107; *Ark. etc. Bank v. Cassidy*, 71 Mo. App. 186; *Fort v. Wells*, 14 Ind. App. 531, 43 N. E. 155; *Warder, etc. Co. v. Harris*, 81 Ia. 153, 46 N. W. 859.

though innocent of wrongful intent and while acting in the utmost good faith. This is especially true where the property which he sells has been stolen from the owner. For it is said that an auctioneer who receives and sells stolen property is liable to the true owner as for a conversion although he acted in good faith and received the property in the usual course of his business.¹ And his liability is otherwise stated thus: An auctioneer who receives and sells stolen property is liable for the conversion to the same extent as any other merchant or individual. This is both upon principle and authority. Upon principle there is no reason why he should be exempted from liability. The person to whom he sells and who has paid the amount of the purchase-money would be compelled to deliver the property to the true owner or pay him its full value; and there is no more hardship in requiring the auctioneer to account for the value of the goods than there would be in compelling the right owner to lose them or the purchaser from the auctioneer to pay for them.²

§ 60. **Same Subject; Knowledge of Wrong.** — The rule is much stronger against an auctioneer who knows the facts concerning the goods he sells. Thus, an auctioneer who sells goods for a fraudulent purchaser thereof under such circumstances as charge him with knowledge that they have been obtained by fraud, is liable for the value of the goods equally with the fraudulent purchaser, and not merely for the amount of his commissions, although he has accounted to his principal for the proceeds of the sale.³ Likewise, where an auctioneer, as agent of the mortgagee in a chattel mortgage void under the insolvency laws, sold the mortgaged property under a power in the mortgage, after notice of the issuance of a warrant in insolvency against the mortgagor and demand of possession, he was held liable for a conversion.⁴ But it has been held that an auctioneer who in good faith advances money upon goods received from one who has fraudulently purchased them will be protected as against the owner of the goods to the extent of his advances.⁵

¹ Mechem, Agency, 915.

² *Rogers v. Huie*, 1 Cal. 429; this case was overruled in the Supreme Court, reported in 2 Cal. 571, where it was held that the auctioneer was not liable unless he knew the goods to have been stolen. But the same court later returned to its first love — at least in principle — in the case of *Cerkl v. Waterman*, 63 Cal. 34.

³ *Morrow Co. v. New England Co.*, 57 Fed. 685, 24 L. R. A. 417.

⁴ *Milliken v. Hathaway*, 148 Mass. 69, 19 N. E. 16, 1 L. R. A. 510.

⁵ *Higgins v. Lodge*, 68 Md. 229, 6 A. S. R. 437; *Lewis v. Mason*, 94 Mo. 551; see, generally: *Coles v. Clark*, 3 Cush. 399; *Robinson v. Bird*, 158 Mass. 357, 33 N. E. 391, 35 A. S. R. 495; *Kearney v. Clutton*, 101 Mich. 106, 59 N. W. 419; the case of *Frizzell v. Rundle & Co.*, 88 Tenn. 396, holds that an auctioneer who, in the regular course of his business, receives mortgaged chattels from the mortgagor and sells them for him on commission and pays over the proceeds thereof without notice, actual or

§ 61. **Conversion of Principal's Property.** — The action of trover may be maintained whenever an agent has wrongfully converted the property of his principal to his own use. Such conversion may be made to appear by showing either a demand and refusal, or that the agent has, without necessity, sold or otherwise disposed of the property contrary to his instructions; when the agent wrongfully refuses to surrender the goods of his principal, or wholly departs from his instructions in disposing of them, he makes the property his own and may be treated as a tort-feasor. But there must be some act on the part of the agent — a mere omission of duty is not enough, although the property may be lost in consequence of the neglect. Nor will trover lie where the agent has acted within the scope of his authority. There must be a departure from his authority before he is guilty of a conversion.¹ In other words, the criterion is whether the agent can be said to have appropriated his principal's property to his own use. And there can be no doubt of such appropriation where the agent uses the property for his own benefit, refuses to surrender it on a proper demand, embezzles it, or sells it contrary to instructions, or refuses to account for the proceeds.

§ 62. **Agent Liable for Disobeying Instructions.** — Thus the agent was held for conversion where he was authorized to dispose of a note in a particular manner and upon certain conditions but disposed of it in an entirely different manner and without compliance with the conditions.² And the agent was held to the same liability where he was sent to obtain a note for his principal but obtained it payable to himself and disposed of it for his own benefit.³ Likewise, where he was instructed to sell a note and apply the proceeds to a debt of the maker and he sold the note and applied the proceeds on a debt due himself.⁴ And where a note was sent to an agent to sell with notice that the sender had drawn on him for the amount of the note, the agent replied that he would not pay the draft, and refused on demand to pay the draft or return the note and did in fact sell the note, he was

constructive, of the mortgage, is not liable to the mortgagee as for a conversion of the goods, although the mortgagor acted fraudulently in the matter; citing: *Roach v. Turk*, 9 Heisk. 708, 24 A. D. 360. But contrary to this, the case of *Kearney v. Clutton*, *supra*, adopts the doctrine which is more consonant with the principles of conversion, that where an auctioneer receives and takes the property into his possession and sells it, paying over the proceeds, less his commission, he is liable, although he has no knowledge of want of title in the party for whom he sells, and acts in good faith. And the court in passing remarked that the auctioneer may protect himself by requiring indemnity. See, also, *Koch v. Branch*, 44 Mo. 542, 100 A. D. 324.

¹ *McMorris v. Simpson*, 21 Wend. 614.

² *Rosenzweig v. Fraser*, 82 Ind. 342; *Badger v. Hatch*, 71 Me. 562.

³ *McNear v. Atwood*, 17 Me. 434.

⁴ *Murray v. Burling*, 10 Johns. 172.

held liable in trover.¹ So, where an agent was given a note and instructed not to let it go out of his hands without getting the money, he was held liable for its conversion where he delivered it to another to get it discounted and the latter got it discounted and used the money for his own benefit.² And the same result follows where the principal places money in the hands of an agent to be loaned in the former's name, but the agent loans it in his own name.³ Likewise, where the principal authorized the agent to sell property, but the latter exchanged it for other property,⁴ as well as where the agent sold the property against the orders of his principal,⁵ or, having authority to sell, pledged the property as collateral for his own debt.⁶

§ 63. Difference between Conversion by Agent and Breach of Trust. — A distinction somewhat technical has been drawn between acts of an agent which amount to a conversion and those which only subject him to an action for a breach of trust. It is said that a mere omission of duty is not enough to constitute a conversion; that there must be some positive act of the agent producing the effect of depriving the principal of his property. Thus, it has been held that an agent instructed to sell goods of his principal for cash only, who sells them on credit, is not guilty of conversion.⁷ Nor was the agent held in an action of trover where he had been instructed to deliver goods only on receipt of adequate security but he delivered them on insufficient security.⁸ I confess to an inability to grasp the distinction sought to be made in these cases from other cases involving the disposition of the principal's property by the agent in violation of instructions, but the distinction seems, nevertheless, to be made by the courts and approved by text-writers.⁹ A further discussion of this subject will be found under the title of Conversion by Bailees.¹⁰

3. OFFICERS

§ 64. Conversion by Officers. — Ministerial officers, such as sheriffs and constables, are frequently held in the action of trover for the conversion of property which they have wrongfully sold or levied

¹ *Security Bank v. Fogg*, 148 Mass. 273, 19 N. E. 378.

² *Lavery v. Snethen*, 68 N. Y. 522, 23 A. R. 184.

³ *Farrand v. Hurlbut*, 7 Minn. 477.

⁴ *Ainsworth v. Partillo*, 13 Ala. 460; *Haas v. Damong*, 9 Ia. 589.

⁵ *Etter v. Bailey*, 8 Pa. St. 442.

⁶ *State v. Berning*, 74 Mo. 87; *Birdsall v. Davenport*, 43 Hun 552; *Nichols v. Gage*,

10 Ore. 82; *Atkinson v. Jones*, 72 Ala. 248.

⁷ *Sarjeant v. Blunt*, 16 Johns. 73; *Loveless v. Fowler*, 79 Ga. 134, 4 S. E. 103, 11 A. S. R. 407.

⁸ *Cairnes v. Bleecker*, 12 Johns. 300.

⁹ *Mechem, Agency*, 476-477.

¹⁰ *Post*: §§ 79 *et seq.*

upon. In the several states different forms of action prevail where the officer has in such way become a tort-feasor. Perhaps the most frequent form of action is trespass. But case and trover may also be proper forms of action.¹ In those states in which the common law forms of action are not retained, the action is merely one for damages. But we will notice those cases in which the officer has been charged for a conversion. Thus, if an officer disregards the exemption rights of a debtor which have been properly asserted, and sells the property without allowing exemption to such debtor, he has been held liable for conversion.² As has been said, the action of trover seems to have rarely been resorted to against officers for wrongfully taking and selling exempt chattels. It is certainly an appropriate form of action, for by disregarding the claim for exemption the officer is guilty of a conversion, respecting which he may be regarded as a tort-feasor from the levy. And, though the exemption is for the benefit of the wife and children as well as for the debtor himself, the latter may, without joining either, maintain an action of trover against an officer for the conversion of exempt property.³ Or, as otherwise said, a sale by a sheriff contrary to a statute or without observing its provisions for the protection of the debtor's exemption rights is a conversion respecting which he may be regarded as a tort-feasor from the beginning, and he may be regarded as having received goods contrary to the provisions of the statute exempting property from sale on execution.⁴ And a sheriff or constable who has levied upon property under a writ entitling him to sell it in the manner prescribed by law, for the purpose of satisfying the writ, is deprived of the protection of his writ and made a trespasser *ab initio* if he abuses his authority, and hence is liable as for the conversion of the property if he sells it in defiance of a proper claim for exemptions, or if he make the sale before or after the time at which he was authorized to make it or at a place different from that designated in the notice of sale, or without any notice at all.⁵

§ 65. **Officer Levying on Property of Wrong Person.** — Trover is also the proper form of action against an officer for levying upon the property of one person under a writ against another. It is true that the owner of such property has a choice of remedies. He may bring a suit in trespass, or trover, or in replevin for possession of the prop-

¹ *Lyon v. Goree*, 15 Ala. 360.

² *McCoy v. Daill*, 6 Baxt. 137 (Tenn.); *Pollard v. Thomason*, 5 Humpt. 56; *Williams v. Miller*, 16 Conn. 144.

³ *Freeman, Executions*, 215a, citing: *Brashwell v. McDaniel*, 74 Ga. 319; *McCoy v. Brennan*, 61 Mich. 362, 28 N. W. 129, 1 A. S. R. 589.

⁴ *McCoy v. Brennan*, *supra*.

⁵ *Freeman, Executions*, 302; *Evarts v. Burgess*, 48 Vt. 206; *Breck v. Blanchard*, 20 N. Y. 223, 51 A. D. 220; *Weston v. Carr*, 71 Me. 356.

erty.¹ Some cases adopt the very broad doctrine that no demand by the owner of property levied upon need be made of the officer, whether the goods were taken from the possession of the owner or of the defendant named in the writ. These courts hold that the mere act of taking the property renders the officer a trespasser and liable to the real owner. But surely the fact of whose possession the property was taken from by the officer should have some weight in determining his liability, or at least in determining what steps, if any, should be taken in fixing his liability. Possession is *prima facie* evidence of ownership. And if property were taken by the officer from the possession of the defendant named in the writ, and nothing further appeared to show ownership in another, the officer would be entitled, till informed differently, to assume the defendant to be the owner. Of course, if he were notified that the property belonged to another, and refused to deliver it to the owner and insisted on retaining possession, he would without doubt be guilty of conversion and would be liable in trover.² So, it has been held that in an action against a sheriff for the conversion of plaintiff's goods which had been sold by the defendant's deputy as the property of a third person in whose possession they were found, an instruction that plaintiff could not recover unless, prior to the sale, he had demanded a return of the goods, was properly refused.³

§ 66. *Same Subject; Wrongful Attachment.* — In like manner, if an officer attach personalty not the property of the defendant, he is a trespasser on the rights of the owner who may maintain either trover, trespass or replevin against him. Such an attachment is a tortious act which is itself a conversion; and if trover be brought it is held that no demand need be made on the officer for a return of the goods.⁴ Thus, pew-panels for a church were left at the church to be paid for by the contractor in cash on delivery. An officer attached the panels as the property of the contractor. The contractor was absent when they were left at the church. In an action of trover against the officer for conversion of the property, it was held that no delivery had been made to the contractor and that the officer was liable.⁵

¹ *State v. Fifield*, 18 N. H. 34; *State v. Richardson*, 38 N. H. 208, 75 A. D. 173; *People v. Hall*, 31 Hun 404; *State v. Downer*, 8 Vt. 424, 30 A. D. 482; *Freeman, Executions*, 254; *Jamison v. Hendricks*, 2 Blackf. (Ind.) 94, 18 A. D. 131.

² *Fuller Co. v. McDade*, 113 Cal. 360, 45 Pac. 694; *Dodge v. Chandler*, 9 Minn. 97.

³ *Norwegian Co. v. Hawthorn*, 71 Wis. 529, 37 N. W. 825; see *Hossfeldt v. Dill*, 28 Minn. 469, 10 N. W. 781.

⁴ *Drake, Attachment*, 196, citing: *Woodbury v. Long*, 8 Pick. 543, 19 A. D. 345; *Ford v. Dyer*, 26 Miss. 243; *Meade v. Smith*, 16 Conn. 346; *Caldwell v. Arnold*, 8 Minn. 265; *Bodeya v. Perkerson*, 60 Ga. 516; *Tufts v. McClintock*, 28 Me. 424; *Richardson v. Hall*, 21 Md. 399.

⁵ *Woodbury v. Long*, *supra*; *Bowen v. Sanborn*, 1 Allen (Mass.) 389; *Johnson v. Farr*, 60 N. H. 426; see, generally, as to liability of officers in trover: 2 Cobby, 53

§ 67. **Liability of Persons Directiong Levy.** — If the plaintiff in a suit direct or instruct the officer to levy an attachment or execution against property not that of the defendant, or upon which he had no right to levy, or upon exempt property for which a proper claim has been perfected, while such does not relieve the officer from liability for such act, it renders the plaintiff also liable and he may be sued in trover by the party injured.¹ An attachment under such circumstances is such official misconduct of the officer that if he acts by direction of the plaintiff or his attorney in the suit, the plaintiff is regarded as equally guilty and equally liable for the trespass; but not so if he take no part in the levy unless he afterward ratify it; and he will be held to have ratified it when he defends against a claim of property filed by the owner in the attachment suit. And against either officer or plaintiff, where both engage in the act, suit may be brought at once without any demand or notice and without the owner's being under any obligation to take any steps in the suit in which the seizure is made.² But it has been held that a creditor pointing out property to attach but never having possession of it is not liable in trover.³

§ 68. **Judgment Plaintiff Assisting in Wrongful Seizure.** — A plaintiff is held accountable where he is present at a wrongful levy of execution, or advises or directs it to be made. He is more frequently held in an action of trespass than in any other, but trover is an appropriate action in such case as the act constitutes, in fact, a conversion, and the injured party may adopt this remedy to enforce his rights. Thus, where a judgment creditor induced the sheriff to seize and sell all of certain personal property which belonged to the judgment debtor and another person he was held liable for the conversion of that interest in the property which did not belong to the judgment debtor.⁴ The rule is that all persons who participate in a wrongful levy of execution are liable whether or not they are parties in interest.⁵ Accordingly, it is held that if a stranger to an execution officiously undertake to direct the sheriff to levy on property not subject to the execution,

Chattel Mortgages, 741, *et seq.*; note in *Worden v. Witt*, 95 A. S. R. 118; *Collins v. State*, 3 Ind. App., 542, 50 A. S. R. 298; *State v. Bergner*, 20 Ind. App. 390, 67 A. S. R. 261.

¹ *Libbey v. Soule*, 13 Me. 310.

² *Drake*, Attachment, § 196 citing: *Marsh v. Backus*, 16 Barb. 483; *Carner v. Mackintosh*, 48 Md. 374; *Meyer v. Gage*, 65 Ia. 606, 22 N. W. 892; *Oestrich v. Greenbaum*, 16 N. Y. S. C. 242; *Butler v. Borders*, 6 Blackf. (Ind.) 160; *Hiddenheimer v. Sides*, 67 Tex. 32, 2 S. W. 87; *Perrin v. Chaplin*, 11 Mo. 13; *Taylor v. Ryan*, 15 Neb. 573, 19 N. W. 475.

³ *Adams v. Abbot*, 2 Vt. 383.

⁴ *Phelps v. Delmore*, 69 Hun 18, 23 N. Y. Supp. 229.

⁵ *McVeagh v. Bailey*, 29 Ill. App. 606; *Brown v. Carroll*, 16 R. I. 604, 18 Atl. 283.

and the sheriff accordingly takes and sells such property, such stranger is liable in trover to the true owner.¹ But where property of a stranger to the writ has been seized under an execution, the judgment creditor is not liable where he does not direct or assent to such levy.² In other words, there must be some positive tortious act to render him liable for a conversion. But an execution plaintiff may render himself liable by ratification of the unlawful acts of the officer as well as by directing them. The ratification may be an adoption in express terms of such acts, or it may arise from inference to be drawn when the plaintiff, with knowledge of all the facts, directs the continued holding of the property seized, attends the sale and bids on the property, or accepts the proceeds of the sale. Ratification may be also shown by proof that after the seizure the plaintiff executed to the officer an indemnifying bond, thereby inducing the officer to continue his possession of the property and selling same.³

4. PLEDGEES

§ 69. **Who are Pledgees.** — The liabilities of pledgees for the conversion of property placed in their possession have, in a measure, been heretofore discussed under the heading of Collateral Securities and Pledged Property.⁴ It is now proposed to develop the subject more in detail. And it may be stated as a premise that a pledgee is a bailee holding personal property intrusted to his possession as security for the payment of a debt due him or for the performance of some other contract or condition by the owner of the property, upon which payment or performance it becomes the duty of the pledgee to return to its owner the specific property so intrusted to his possession. It will thus be seen that possession is the prime essential of a contract of pledge, and without it the creditor has no rights he can maintain as a pledgee against the property of his debtor. If the pledge once take effect by delivery of possession to the pledgee, the lien will be lost if possession be re-delivered to the pledgor by the pledgee, or by another with his consent, unless such re-delivery be for a temporary use or with the understanding that the pledgor shall have possession as agent of the pledgee. Any species of personal property which is capable of delivery may be the subject of a pledge, and where the delivery is made for the purpose of securing re-payment of money advanced, the term pawn is frequently used to designate

¹ *Youngs v. Moore*, 30 Ky. 646.

² *Averill v. Williams*, 1 Denio 501.

³ For a full discussion of the liabilities here referred to, see *Freeman on Execution*, 273, and the numerous cases there cited.

⁴ §§ 42-50, *ante*.

the transaction, and collateral security ¹ is used to indicate the delivery of incorporeal chattels, such as stocks, bonds and choses in action, for the performance of other engagements as well as securing re-payment of money advanced.

§ 70. **Pledgee has Sufficient Interest to Sue for Conversion.** — A pledgee has a special right of property in the thing delivered into his possession which is co-extensive with the object for which it was pledged in point of time. He has the right to its exclusive possession. And if the property be wrongfully taken from him he may maintain replevin for its recovery or trover for its conversion. And if the pledgor take the property before paying his debt or performing his obligation to the pledgee, the latter may have his action for the tort the same as if the property had been taken by any other wrongdoer. And the pledgee may deal with the pledged property in any way he may desire so long as nothing is done by him to deprive the owner of his right to redeem upon payment of the debt due or performance of his obligation, and thereupon have the specific property returned to him. Thus, it is held that a pledgee may assign the principal debt with the pledge to a third party who will hold it subject to payment and redemption by the pledgor, and not thereby be guilty of conversion.² But any disposition of the property which would deprive the pledgor of his right and ability to procure immediate possession thereof upon payment or tender of the amount due would amount to a conversion.³ The criterion by which to measure the liability of a pledgee for his dealing with the pledged property in his possession is, does such dealing impair the rights of the pledgor to have such property returned to him upon payment of the debt or performance of the obligation for which the property stands as security? If this proposition be negatived, then any transfer of the property will not impair the original lien nor render him liable for a conversion.⁴ The rule has been broadly stated thus: A pledgee may deliver the pledged property to a stranger without consideration, or he may sell or assign all his interest absolutely, or he may sell or assign it conditionally by way of pledge, without in either case destroying the original lien or giving the owner the right to redeem the property upon any other or better terms than he could have done before such delivery or assignment.⁵

¹ Bouvier's L. Dict., Title "Collateral Security."

² *Chapman v. Brooks*, 31 N. Y. 75.

³ *Douglas v. Carpenter*, 17 App. Div. 329 (N. Y.).

⁴ *Talty v. Freedman's Co.*, 93 U. S. 321, 23 L. Ed. 886; *Williams v. Ashe*, 111 Cal. 180, 43 Pac. 593.

⁵ *Jarvis v. Rogers*, 15 Mass. 389; see *Belden v. Perkins*, 78 Ill. 449; *Whitney v. Peay*, 24 Ark. 22.

§ 71. **What Acts of Pledgee Amount to Conversion.** — But on the other hand, it is practically the universal rule that if the pledgee, by an unauthorized disposition of the property puts it out of the power of himself to re-deliver same to the pledgor upon payment of the amount due, such will amount to a conversion that will render the pledgee liable in trover for the value of the property.¹ Under these rules, it has been held that a pledgee may exchange the pledged property for other securities unless restricted by the contract of pledge.² And a creditor is not liable in trover where he transfers notes pledged to him together with the principal debt to a third party who converts them to his own use.³ But it is said that a pledge is not for use, but for security; and if the pledgee sell it without authority it is a violation of his trust, although he may afterward purchase other articles of the same kind and value to be returned to the pledgor, unless there is some agreement between the parties permitting him to do so,⁴ although the rule announced in the case last cited has not been strictly adhered to in cases of pledge of corporate stock or of bonds where the pledgee had at all times a sufficient number of like shares or bonds to deliver to the pledgor.⁵

§ 72. **Duties of Pledgee as to Property Pledged.** — The rights of a pledgee are in most instances determined by an agreement entered into at the time of making the pledge. When there is such an agreement its provisions will be enforced unless they be contrary to law or public policy.⁶ But in the absence of a special agreement accompanying the pledge, the law fixes upon the pledgee certain duties in regard to the pledged property. He must not dispose of it so as to put it beyond his power to re-deliver to the pledgor upon payment or tender of the principal debt; he must use ordinary and reasonable care of the property while it is in his possession; he must not sell it upon maturity of the principal debt without giving notice to the pledgor of the time and place of sale to the end that the owner may have an opportunity to redeem; and it is said that if the subject of the pledge be negotiable instruments he is not entitled, upon demand of pay-

¹ *Rosenzweig v. Fraser*, 82 Ind. 342; *Luckey v. Gannon*, 37 How. Pr. 134; *Maryland Ins. Co. v. Dalrymple*, 25 Md. 242, 89 A. D. 779; *E. F. Hallack Co. v. Gray*, 19 Col. 149, 34 Pac. 1000.

² *Girard Co. v. Marr*, 46 Pa. 504.

³ *Goss v. Emerson*, 23 N. H. 42; *Easton v. Hodges*, 18 Fed. 677.

⁴ *Dykens v. Allen*, 7 Hill (N. Y.) 497, 42 A. D. 87; *Stuart v. Bigler*, 98 Pa. 80; *Allen v. Dubois*, 117 Mich. 115, 75 N. W. 443.

⁵ *Nourse v. Prime*, 4 Johns. Ch. 490, 8 A. D. 606, S. C. 7 Johns. Ch. 69, 11 A. D. 403; *Skiff v. Stoddard*, 63 Conn. 198, 26 Atl. 874, 21 L. R. A. 102; *Casewell v. Putnam*, 120 N. Y. 153, 24 N. E. 287; *Boylan v. Huguet*, 8 Nev. 345; but see *Wilson v. Little*, 2 N. Y. 443, 51 A. D. 307.

⁶ *Colebrook*, Col. Sec. 118; *Union Trust Co. v. Rigdon*, 93 Ill. 458.

ment and default of the principal debt, and notice to the pledgor, to offer them for sale at either public or private sale,¹ but he must wait until their maturity and collect them. And since, of course, where a pledgor, where there has been a special agreement as to the duties and rights of the pledgee, cannot object where the agreement has been complied with by the pledgee, the subsequent discussion of this subject will relate only to instances where there has been no such agreement.

§ 73. **Unauthorized Sale or Re-pledge by Pledgee.** — A pledgee must have an unpaid balance, or he has no claims against the property pledged. And he has no right to sell or re-pledge it, and if he does so, he will be guilty of a conversion,² for in such case the owner is entitled to a re-delivery of his property,³ this being within the elementary rule that any wrongful sale of pledged property is a conversion.⁴ And the intention of the pledgee is immaterial in determining his liability, for a wrongful sale, even by mistake and not in bad faith, is nevertheless a conversion.⁵ The duties of a pledgee as to the sale of pledged property were clearly set forth in an early New York case as follows: "Non-payment of the debt did not work a forfeiture of the pledge either by the civil or at the common law. It simply clothed the pledgee with authority to sell the pledge and reimburse him for his debt, interest and expenses; and the residue of the proceeds of the sale belonged to the pledgor. The old rule existing at the time of Glanville, required a judicial sentence to warrant a sale, unless there was a special agreement to the contrary. But as the law now is, the pledgee may file a bill in chancery for a foreclosure and proceed to a judicial sale, or he may sell without judicial process upon giving reasonable notice to the pledgor to redeem and of the intended sale. . . . If the pledgor cannot be found and notice cannot be given to him, judicial proceedings to authorize a sale must be resorted to. Before giving such notice, the pledgee has no right to sell the pledge; and if he do, the pledgor may recover the value of it from him without tendering the debt, because by the wrongful sale the pledgee has incapacitated himself to perform his part of the contract, that is to return the pledge, and it would therefore be nugatory to make the tender." ⁶

¹ Colebrook, Col. Sec. 151; *Morris Co. v. Lewis*, 12 N. J. Eq. 323; *Nelson v. Edwards*, 40 Barb. 279; *Whittaker v. Gas Co.*, 16 W. Va. 717.

² *Jones, Pledges*, 505, and 507; *Lawrence v. Maxwell*, 53 N. Y. 22.

³ *Jones, Pledges*, 466; *Merchants Bank v. State Bank*, 77 U. S. (10 Wall.) 604, 19 L. Ed. 1017.

⁴ *Potter v. Bank*, 28 N. Y. 641, 86 A. D. 273.

⁵ *Wright v. Bank*, 110 N. Y. 237, 18 N. E. 79, 6 A. S. R. 356, 1 L. R. A. 289.

⁶ *Stearns v. Marsh*, 4 Denio 227, 47 A. D. 248; see, also, *Ogden v. Lathrop*, 65 N. Y. 162; *Bryan v. Baldwin*, 52 N. Y. 234; *Ainsworth v. Bowen*, 9 Wis. 349; *Talty v. Trust Co.*, 93 U. S. 321; *McCalla v. Clark*, 55 Ga. 53.

In the case just noticed, a pledgee had sold pledged property without any notice at all to the pledgor and for about one-fifth its value. The court held him liable in trover for the value of the property. It is said that this rule "is commended by every consideration of fair dealing. At best the remedy is very summary and it operates against the property of needy debtors generally. It is but just, therefore, that an opportunity to redeem should be allowed to the last; or, if unable to accomplish that desirable end, that the debtor may have an opportunity to procure the attendance of bidders to prevent the sacrifice of his property or collusive sales to interested parties."¹ This reasoning applies with even more force where the time for payment of the principal debt is not stated or is indefinite. For in such case, the pledgee cannot sell the property without a reasonable notice to the pledgor to redeem, but even the principal debt does not mature till demand is made.²

§ 74. **Same Subject; How Sale to be Made.** — It is the general rule, subject only to special agreement, that when pledged property is sold by the pledgee the sale must be made at public auction. In other words, the pledgee must give to the pledgor every opportunity to redeem his property, and if the latter be unable to do so, then the sale must be so conducted as that the pledgor may procure bidders to attend the sale to the end that the property may be made to bring the highest possible price. Unless the sale be at public auction it is invalid,³ unless, of course, it be ratified by the pledgor or the irregularity waived. If the sale be a private one with the consent of the pledgor, he cannot object to it.⁴ The pledgor, accordingly, has an election to either treat a private sale of his pledged property as valid and claim the proceeds, or to repudiate it and look to the pledgee for the value of the property.⁵

§ 75. **Same Subject; Who may Buy Pledged Property.** — Even if proper demand has been made, notice given, and a sale held at public auction, the pledgee has no right to become the purchaser of the pledged property.⁶ It would be against public policy to permit him to become such purchaser against the wishes of the pledgor as

¹ *Davis v. Funk*, 39 Pa. St. 243, 80 A. D. 519; cited and approved in *Wheeler v. Pereles*, 43 Wis. 338; *Cushman v. Hayes*, 46 Ill. 153; *Diller v. Brubacker*, 52 Pa. St. 498, 91 A. D. 177; *Gay v. Moss*, 34 Cal. 125; *Morgan v. Dod*, 3 Col. 551; *Sharpe v. Bank*, 87 Ala. 644, 7 So. 106.

² *Barrow v. Paxton*, 5 Johns. 260, 4 A. D. 354; *Greer v. Bank*, 128 Mo. 559, 30 S. W. 319; *Wilson v. Little*, 2 N. Y. 443, 51 A. D. 307.

³ *Brass v. Worth*, 40 Barb. 648; *Footte v. Bank*, 17 Utah 283, 54 Pac. 104; *McLe-more v. Hawkins*, 46 Miss. 715; *Conynghan's App.*, 57 Pa. St. 480.

⁴ *Hamilton v. Bank*, 22 Ia. 306.

⁵ *Strong v. Banking Assoc.*, 45 N. Y. 718.

⁶ *Maryland Ins. Co. v. Dalrymple*, 25 Md. 242, 89 A. D. 779.

it would have a tendency to tempt unscrupulous pledgees to make efforts to suppress competition and might often result in the acquiring by the pledgee of property of great value for a small bid, to the consequent loss of a hard-pressed debtor. It must be understood, however, that such a purchase by a pledgee is voidable and not void. The pledgor has the option to affirm or repudiate the sale. If he affirms it, his action validates it and the pledgee acquires title to the property; but if he repudiates it the pledgee still retains the property under the original pledge with all the rights and subject to all the liabilities as if no sale had been attempted, and he cannot be held in trover for a conversion of the pledged property until he parts with the possession and control of it.¹ Likewise, a pledgee is not liable for a conversion where he proceeds in his own name and procures judgment for the foreclosure of a mortgage pledged to him as security for a debt; he is only liable to account for the proceeds of the judgment.² The same rules herein announced obtain in cases where the pledgee attempts to appropriate the pledged property to the satisfaction of the debt without authority therefor from the pledgor. In such case the agreement of pledge is left as before the attempted appropriation, and unless the pledgee has parted with possession of the property or so disposed of it as to render a return to the pledgor impossible, there will be no conversion.³ It is said that if the pledgee is not able to re-deliver the property to the pledgor at maturity of the principal debt such is presumptive evidence of a conversion.⁴

§ 76. Whether Tender by Pledgor Necessary. — It has been held in the case of conversion of pledged property that the pledgor in order to maintain trover, must tender to the pledgee the amount due on the principal debt.⁵ On the other hand, with apparently the better reasoning, it is held that such tender of payment is unnecessary, especially if an unauthorized disposition of the property has been made by the pledgee before maturity of the principal debt.⁶ The law does not require the doing of a useless thing, and the pledgee, having dis-

¹ *First Nat'l Bank v. Rush*, 56 U. S. App. 556, 85 Fed. 539, 29 C. C. A. 333; *Terry v. Bank*, 93 Ala. 599; *Canfield v. Minn. Assoc.*, 4 McCreary 646, 14 Fed. 801; *Bryson v. Rayner*, 25 Md. 424, 90 A. D. 69.

² *McArthur v. Magee*, 114 Cal. 126, 45 Pac. 1068; *Glidden v. Bank*, 53 Ohio St. 588, 42 N. E. 995, 43 L. R. A. 737; see *Carroll v. Bank*, 8 Mo. App. 249.

³ *Diller v. Brubaker*, 52 Pa. St. 498, 91 A. D. 177; *Robinson v. Hurley*, 11 Ia. 410, 79 A. D. 497.

⁴ *Stuart v. Bigler*, 98 Pa. St. 80; but see: *Reeves v. Plough*, 41 Ind. 204.

⁵ *McCalla v. Clark*, 55 Ga. 53; *Talty v. Trust Co.*, 93 U. S. 321; *Hancock v. Insurance Co.*, 114 Mass. 155; *Butts v. Burnett*, 6 Abb. Pr. N. S. 302.

⁶ *Stearns v. Marsh*, 4 Denio 227, 47 A. D. 248; *Work v. Bennett*, 70 Pa. 484; *Walley v. Bank*, 14 Utah 305, 47 Pac. 147; *Luckett v. Townsend*, 3 Tex. 119, 49 A. D. 723.

abled himself from performing his part of the contract, it would be a fruitless act to make a tender in order to get done what was known in advance could not be done. Thus, where a pledgor was sued on the principal debt, it was held that he need not tender payment but that he could maintain a counter-claim for damages for a wrongful sale and consequent conversion of the pledged property.¹ Neither need there be a demand for the restitution of the property.² In support of the doctrine that a tender of the amount due on the principal debt is a necessary preliminary to the maintaining of an action for the conversion of pledged property, it is said that the right to the possession of the property follows from the extinguishment of the debt secured or a sufficient tender of payment of the debt, and until such payment or tender of payment the right of possession does not revert in the pledgor, and that, accordingly, where no tender has been made, the pledgor cannot maintain trover against the pledgee even where the latter has violated his duty in making a wrongful sale of the property without notice to the pledgor.³

§ 77. Remedies of Pledgor for Conversion of Property Pledged. — Trover is the proper remedy of a pledgor against a pledgee who has wrongfully sold or otherwise disposed of the pledged property so as to put it out of his power to deliver it to the owner upon payment by the latter of the principal debt. But other remedies and forms of action have been attempted, and it has been sought to invoke the aid of equity in such cases. But it is said that the pledgor has a full, adequate and convenient remedy at law for the enforcement of his rights, and that a bill in equity seeking an application of his damages to the debt secured will not be sustained especially during the pendency of an action on the principal debt.⁴ And a bill to redeem pledged property cannot be maintained where it appears that there has been a conversion of it by the pledgee;⁵ but in a case of the same nature where it appeared that there was no good ground for the suit to redeem, the court permitted the case to be tried to the jury as one of tort.⁶ Contrary to this, however, it has been held that an equitable action for accounting by a pledgor as against his pledgee who had sold the

¹ First Nat'l Bank v. Rush, 56 U. S. App. 556, 85 Fed. 539, 29 C. C. A. 333.

² Waring v. Gaskill, 95 Ga. 731, 22 S. E. 659; but see Rankin v. McCullough, 12 Barb. 103.

³ Reardon v. Patterson, 19 Mont. 231, 47 Pac. 596; Potter v. Thompson, 10 R. I. 1; of course, a tender after a sale properly made must necessarily be unavailing: Lacombe v. Forstall, 123 U. S. 563, 31 L. Ed. 255; Gilmer v. Morris, 80 Ala. 78, 60 A. R. 85; Loomis v. Stave, 72 Ill. 623.

⁴ Bulkeley v. Welch, 31 Conn. 339.

⁵ Roland v. Bank, 135 Pa. 598, 19 Atl. 951.

⁶ Genet v. Howland, 45 Barb. 560.

pledged property could not be converted into an action of tort for the recovery of damages for the wrongful sale of the property.¹ And unliquidated damages for the unauthorized sale of pledged property can form no part of an account so as to give a court of equity jurisdiction.² It has been said, somewhat anomalously, that a pledgor has an election of remedies against a pledgee for a conversion of the pledged property; he may maintain trover or assumpsit, or may, when sued by the pledgee on the principal debt, set off the value of the property converted.³ And it has been elsewhere held that the pledgor may set up a wrongful conversion on the part of the pledgee by way of defense to an action brought by the latter for the recovery of the main debt.⁴ Such conversion, it is said, being an act connected with the original transaction wherein the principal debt was created, is a proper matter of set-off in an action for the original indebtedness.⁵

§ 78. **Statutory Rights of Pledgors and Pledgees.** — Many states have enacted statutes governing the rights of pledgors and pledgees, and of course in such states these statutes fix and determine the status, duties and liabilities of parties in this relation, so that it is not left for the courts to announce the law but merely to apply the provisions of the statute to the facts of each particular case.

5. BAILEES

§ 79. **Duties and Liabilities of Bailees, in General.** — A bailment is a delivery of personal property to a person thereupon called the bailee, to be held by him pending the accomplishment of some purpose agreed upon between him and the owner or bailor and to be returned to the latter upon the accomplishment of such purpose. The duties to act in good faith are assumed by the bailee and it is implied that he shall perform his undertaking in respect to the property intrusted to him with the diligence and care required by the nature of the bailment.⁶ I have heretofore treated of the liabilities of certain classes of bailees in separate divisions of this work,⁷ and shall hereafter in the

¹ *Lewis v. Varnum*, 12 Abb. Pr. 308, holding, also, that this is an action in which a joint trial must be had unless waived by the parties in the manner prescribed by law.

² *Durant v. Einstein*, 35 How. Pr. 231.

³ *Stearns v. Marsh*, 4 Denio 227, 47 A. D. 248, citing *Butts v. Collins*, 13 Wend. 139.

⁴ *Donnell v. Wyckoll*, 40 N. J. L. 48; *Stuart v. Bigler*, 98 Pa. 80; *Gruman v. Smith*, 81 N. Y. 25; *Bulkeley v. Welsh*, 31 Conn. 339; *Wicks v. Hatch*, 62 N. Y. 535; *Sitgreaves v. Bank*, 49 Pa. 359.

⁵ *Richardson v. Ashby*, 132 Mo. 238, 33 S. W. 806; *Worthington v. Forney*, 34 Md. 162.

⁶ *Bouvier's L. Dict.*, "Bailee."

⁷ See heading, *ante*, "Pledgee", Sec. 69.

same arrangement discuss others,¹ the frequency with which the question of such liabilities has come before the courts rendering it proper to give special attention to them other than under the general name of bailees. In the present division it is proposed to set down the rules to be deduced from the cases relating to the conversion by bailees of the property delivered to them as such. And it may be stated in general that a bailee who does anything to or with the property not fairly authorized by the agreement and whereby it is lost to the owner is liable for its conversion.² And this is true whatever the nature of the bailment, a gratuitous bailee even being held to the same liability,³ and it is immaterial how good his intentions were.⁴ But it has been said that in order to hold a bailee in trover, the act constituting the conversion must have been intentional and it must have been inconsistent with the rights of the bailor as expressed in the contract of bailment. Thus, where one hired a horse to go to and return from a particular place, but in returning got on the wrong road and after discovering his error took what he believed to be the best way back, he was held not to have converted the horse, even though his return road led through another town.⁵ Mr. Cooley says that any dealing with the subject of the bailment in a manner not warranted by the understanding is wrongful, using, as an illustration, that if one having undertaken to carry and deliver money for another, shall hand it over to a third person to be carried from whom it is stolen or by whom it is lost, the loss must fall upon the bailee who alone was trusted by the owner.⁶ But in a case where the defendant had received bills of exchange for acceptance, and on demand for them by the person entitled thereto, he looked for them but not finding them said that he might have burnt them up with papers he considered of no value, it was held that he was not liable in trover, there being no evidence of a voluntary or intentional destruction of the bills.⁷ But where a bailee changed the nature of the property, thereby depriving the owner of his rights, he was held liable for its conversion.⁸

§ 80. Conversion by Mis-use of Property Bailed. — The general

¹ See heading, *post*, "Carriers", Sec. 92.

² *Malone v. Robinson*, 77 Ga. 719.

³ *Onderkirk v. Bank*, 119 N. Y. 263.

⁴ *Hubbell v. Blandy*, 87 Mich. 209, 49 N. W. 502, 24 A. S. R. 154.

⁵ *Spooner v. Manchester*, 133 Mass. 270, 43 A. R. 514.

⁶ Cooley, "Torts", page 754, *Boyd v. Estis*, 11 La. Ann. 704.

⁷ *Salt Springs Bank v. Wheeler*, 48 N. Y. 492, 8 A. R. 564; this case, while discharging the defendant in the action of trover, holds *obiter* that the plaintiff could have recovered upon contract under a statute of that state.

⁸ *Fryatt v. Sullivan Co.*, 7 Hill (N. Y.) 529.

rule is that a bailee though lawfully in possession of the property at the time, is guilty of a conversion of it if he has made an illegal use of it or has abused the conditions under which it was delivered to him.¹ Thus, where one to whom property had been delivered to be sold for the owner turned it in payment of one of his own debts, he was held liable for its conversion.² And the same liability was imposed where the bailee pledged the bailed property for his own debt.³ Likewise, where the consignee sold the bailed property as that of one known by him not to be the owner.⁴ But it is held that the failure of a bailee to properly care for a part of the property does not render him liable for the conversion of it.⁵ It has been said that in respect of the liability of a bailee for a departure from the terms of the bailment and a consequent mis-use of the property bailed, there is no distinction between a borrower and a hirer.⁶ And this statement is pertinent to the subject we are now discussing, as a vast majority of the cases arising in trover for the mis-use of bailed property are for the values of horses or vehicles hired or borrowed to go to a particular place and the bailee has deviated from the manner or course of his proposed journey. In such cases the older decisions regarded the slightest deviation from the strict terms of the contract a conversion which charged the bailee with the value of the property. Thus, the hirer of a horse who rode it to a place beyond which he was authorized to go was held in a very early Massachusetts case liable in trover.⁷ The point is made that the engagement of the hirer is to put the horse to no other use than that for which it was hired.⁸ So, where horses were loaned to go to one place and they were taken to another where they became sick and died, the court held that the right to use them was confined strictly to the terms of the transaction, and that the borrower, by the deviation, made himself responsible for the loss, although it was by an inevitable casualty.⁹ A distinction has been made in considering the liability of a hirer, between those cases where the injury to the horse occurred within

¹ See, generally: *Farkas v. Powell*, 86 Ga. 800, 13 S. E. 200, 12 L. R. A. 397; *A. T. & S. F. Ry. Co. v. Schriver*, 72 Kan. 580, 84 Pac. 119; *Neal v. Hanson*, 60 Me. 84; *De Voin v. Lumber Co.*, 64 Wis. 616, 25 N. W. 552; *Martin v. Cuthbertson*, 64 N. C. 328; *Crump v. Mitchell*, 34 Miss. 449; *Louisville, etc. Co. v. Barkhouse*, 100 Ala. 543, 13 So. 534.

² *Rodick v. Coburn*, 68 Me. 170.

³ *Stevens v. Eames*, 22 N. H. 568; *Birdsall v. Davenport*, 43 Hun 552.

⁴ *Covell v. Hill*, 6 N. Y. 374.

⁵ *Thompson v. Moesta*, 27 Mich. 182.

⁶ *Disbrow v. Tenbroeck*, 4 E. D. Smith 397.

⁷ *Wheelock v. Wheelwright*, 5 Mass. 104, followed in *Rotch v. Hawes*, 12 Pick. 136, 22 A. D. 414; *Morton v. Gloster*, 46 Me. 520.

⁸ *Harrington v. Snyder*, 3 Barb. 380; *Buchanan v. Smith*, 10 Hun 474.

⁹ *Lane v. Cameron*, 38 Wis. 603.

the limits of the authorized journey and where it occurred beyond those limits. Thus, it is said that if the horse be taken beyond the place to which he is hired to go, it is at least a technical conversion, and if the horse be injured while beyond that place, the hirer will be liable whether the injury be caused by his own negligence or by that of others or even by accident, unless he was forced to go beyond the designated place by circumstances over which he had no control; but if injury occur after he has returned within the limits authorized by the hiring, he will not be liable unless the injury was caused by his own negligence or unless the extra driving materially contributed to the injury.¹ The cases agree that if the loss occur outside the limits prescribed by the hiring, the hirer is liable.² And some go so far as to indicate that the same liability attaches whether the loss occurred within or without the authorized limits. Thus, it has been held that if a horse be driven to a place beyond which he was hired to go, such is an unlawful conversion, and a failure to return the horse renders the hirer liable for its value; so that if he drive the horse five or six miles beyond the authorized place and on the return trip the horse die, the driver must pay for it.³

§ 81. **What Deviation from Line of Travel Amounts to Conversion by Hirer of Horse.** — But the tendency of the modern decisions is to relax the harshness of this doctrine that holds a driver liable for every departure from the strict terms of the bailment, and to hold that the mere act of deviating from the line of travel that the hiring covered, or going beyond the designated place are acts which, of themselves, do not necessarily imply an assertion of title or right of dominion over the property inconsistent with the bailor's interest therein, and, consequently, do not amount to a conversion. It is said that it is not difficult to conceive that the technical mis-use might occur without an actual abuse of the terms of the hire, and where it would be harsh to visit deviation with such disastrous penalties.⁴ Then, again, the hirer's liability has been determined on the intent with which he did the act alleged to be a conversion. Thus, it has been said that if a person wrongfully exercises acts of ownership or of dominion over property under a mistaken view of his rights, the tort, notwithstanding his mistake, may still be a conversion, because he has both claimed and exercised over it the rights of an owner; but whether an act involving the temporary use, con-

¹ *Farkas v. Powell*, 86 Ga. 800, 13 S. E. 200, 12 L. R. A. 397.

² *Murphy v. Kaufman*, 20 La. Ann. 559; *Malone v. Robinson*, 77 Ga. 719; *Fisher v. Kyle*, 27 Mich. 454; *Perham v. Coney*, 117 Mass. 102.

³ *Welch v. Mohr*, 93 Cal. 371, 28 Pac. 1060.

⁴ *Schouler, Bailments*, p. 137.

trol or detention of property implies an assertion of a right or dominion over it, may well depend upon the circumstances of the case and the intention of the person dealing with the property.¹ In this case the hirer on his return trip had taken a wrong road by mistake, and he was absolved from liability on the ground that he had no intention of converting the property. The court give a lucid discussion of what amounts to a conversion and in the course of their opinion use the following language: Conversion is based upon the idea of an assumption by the defendant of a right of property or a right of dominion over the thing converted which casts upon him all the rights of an owner, and it is therefore not every wrongful intermeddling with or asportation or wrongful detention of personal property that amounts to a conversion. Acts which themselves imply an assertion of title or a right of dominion over personal property, such as a sale, letting or destruction of it, amount to a conversion, even although the defendant may honestly have mistaken his rights; but acts which do not in themselves imply an assertion of title, or of a right of dominion over such property will not sustain an action of trover, unless done with the intention to deprive the owner of it permanently or temporarily, or unless there has been a demand for the property and a neglect or refusal to deliver it, which are evidence of a conversion, because they are evidence that the defendant in withholding claims the right to withhold it, which is a claim of a right of dominion over it.²

§ 82. **Mis-use of Hired Chattel.** — It was said in an early South Carolina case that the law of bailments is as clear and as wellsettled as anything human can be, that the use of a thing hired in any way different from that for which it was hired, makes the person hiring it liable for any injury or loss in such service.³ It is readily to be seen that this rigorous rule does not comport with the trend of modern authorities,⁴ but it is still the universal rule that if the act complained of resulted in the denial of the owner's right to the property, or destroyed it, or was done with the intent to injure or impair the reversionary interest of the bailor therein, it will constitute a conversion.⁵

¹ *Spooner v. Manchester*, 133 Mass. 270, 43 A. R. 514; cited and followed in *Doolittle v. Shaw*, 92 Ia. 348, 60 N. W. 621, 26 L. R. A. 366.

² See, also: *Spooner v. Holmes*, 102 Mass. 503, 3 A. R. 491; *Hall v. Corcoran*, 107 Mass. 251, 9 A. R. 30; *King v. Bates*, 57 N. H. 446; *Bradley v. Parks*, 83 Ill. 169; *Harley v. Epes*, 12 Gratt. (Va.) 153; *Ray v. Tubbs*, 50 Vt. 688; *Frost v. Plumb*, 40 Conn. 111; *Stewart v. Davis*, 31 Ark. 518.

³ *Duncan v. Railway Co.*, 2 Rich. 613.

⁴ See, generally: *Jones v. Fort*, 36 Ala. 449; *Kelly v. White*, 17 B. Mon. 124; *Malaney v. Taft*, 60 Vt. 571, 15 Atl. 326.

⁵ *Harvey v. Epes*, 12 Gratt. (Va.) 153.

Thus, where property was bought on a conditional sale but before paying for it the buyer mortgaged it, such was held a conversion.¹

§ 83. **Liability of Infant Bailee.** — All bailees are held accountable under the foregoing rules, and it is no defense that a bailee happens to be an infant. In this class of cases, infancy cannot avail a defendant for the reason that the suit is not upon a contract but for a tort. It is true that the tort in a way arises out of the contract and never would have been committed but for the contract. Yet if an infant drive a horse beyond the place where he agreed to go he is liable in trover for an injury to or loss of the horse in the same measure as if the hirer were an adult.² It is said that there are cases in which infancy has been held to be a good defense to an action *ex delicto* for tort committed under the contract or in making it; but not in a case where an infant hires a horse to go one place and goes another. Such act is committed, not under the contract, but by abandoning it. It is true that the contract must generally be put in proof to support the action, but this is because the tort, inasmuch as it is committed by departing from the contract, cannot be shown without showing the contract, and not because the contract is otherwise involved.³ So long as the infant keeps within the terms of the bailment, his infancy is a protection to him, whether he neglects to take proper care of the horse or drives him immoderately. But when he departs from the object of the bailment, it amounts to a conversion of the property and he is liable as much as if he had taken the horse in the first instance without permission. And this is no hardship; for the infant as well knows that he is perpetrating a positive wrong when he hires a horse for one purpose and puts him to another as he does when he takes another's property by way of trespass.⁴

§ 84. **Wrongful Sale of Bailed Property by Bailee.** — Trover is, in a way, a possessory action; that is, plaintiff must have a right to the possession of property before he can maintain trover for its conversion. Therefore, as long as a contract of bailment subsists, a bailee cannot be held in trover for the conversion of bailed property, for he is entitled to its possession. But in most cases a tortious conversion of the property terminates the contract of bailment. It is accordingly the rule that an unauthorized sale of the bailed property is a conversion of it and *ipso facto* puts an end to the contract of

¹ Rodney Hunt M. Co. v. Stewart, 57 Hun 545, 11 N. Y. Supp. 448.

² Homer v. Thwing, 3 Pick. 492.

³ Freeman v. Boland, 14 R. I. 39, 51 A. R. 340; Morton v. Gloster, 46 Me. 520, and Frost v. Plumb, 40 Conn. 111, to the point that the contract forms no part of the case in trover and need not be shown.

⁴ Towne v. Wiley, 23 Vt. 355, 56 A. D. 85; Ray v. Tubbs, 50 Vt. 688, 27 A. R. 519.

bailment and the bailor is entitled to sue in trover for the conversion. It is said that in case of such wrongful sale trover will lie either against the bailee, the purchaser or any one claiming under the sale.¹ Certainly it may be maintained against the bailee, for by the sale he knowingly asserts and exercises rights over the property contrary to the bailment, and exercises dominion in derogation of the rights of the bailor.

§ 85. **Same Subject; Bailor's Right of Possession.** — In a suit for the conversion of a mare through a wrongful sale by a bailee before the expiration of the period for which the mare was hired, the court said: "It is very clear that if the plaintiff in this case had, at the time he demanded the mare of the defendant, no right to the possession, this action cannot be maintained. And if the contract between the plaintiff and Brown (the hirer) was still at that time in force, the plaintiff certainly had not the right of possession. But it is said on behalf of the plaintiff that the contract between the plaintiff and Brown was at an end; that Brown had the mare to use and not to sell, and that the sale was a wrongful act, which authorized the plaintiff to consider the contract at an end and to claim possession of the mare wherever she could be found. We are, on the whole, of the opinion that this argument is unanswerable. The sale of the mare was, under the circumstances, a conversion of the property and most clearly put an end to the contract."² And a sale, in the absence of authority therefor, is a conversion whether no power to sell under any circumstances existed, or whether there was a failure to comply with some condition precedent to the exercise of that power.³ And even where a bailee has an interest in property, as where he is a lessee or purchaser under a conditional sale contract, yet if he make an absolute and unconditional transfer of it, it is an assertion of a right inconsistent with the owner's title and constitutes a conversion.⁴ And even if a bailee be intrusted with property for the purpose of selling it, he is guilty of conversion if he use or dispose of it in any other manner, as where he pledges it,⁵ or exchanges it for other property.⁶

¹ *Harpending v. Meyer*, 55 Cal. 559; *Calhoun v. Thompson*, 56 Ala. 160; *Lovejoy v. Jones*, 30 N. H. 165.

² *Sanborn v. Coleman*, 6 N. H. 14, 23 A. D. 703; followed in *Bailey v. Colby*, 34 N. H. 29, 66 A. D. 752, holding that such a sale put an end to the bailment, even where the hirer had the option to purchase at any time during the term; see *Gentry v. Madden*, 3 Ark. 127; *Grace v. McKissack*, 49 Ala. 163; *Swift v. Mosely*, 10 Vt. 208, 33 A. D. 197.

³ *Rosenzweig v. Fraser*, 82 Ind. 342.

⁴ *Sims v. James*, 62 Ga. 260; *Swift v. Mosely*, *supra*.

⁵ *State v. Berning*, 74 Mo. 87; *Nichols v. Gage*, 10 Ore. 82; *Newcomb Co. v. Baskett*, 14 Bush, 658.

⁶ *Atkinson v. Jones*, 72 Ala. 248.

§ 86. **Delivery by Bailee to Unauthorized Person.**—The rule that a bailee must not take any step or commit any act in relation to the bailed property contrary to the terms of the contract of bailment applies to cases where the bailee has delivered the property to a person without authority to receive it. For it is said that a mis-delivery of property by a bailee to a person unauthorized by the true owner is of itself a conversion, rendering the bailee liable in trover without regard to the question of due care or degree of negligence. This is a well established legal principle, applicable to every description of bailment. The action of trover is not maintained by proof of negligence, but only by misfeasance amounting to a conversion. And a delivery to an unauthorized person is as much a conversion as would be a sale of the property or an appropriation of it to the bailee's own use. In such case neither a sincere and apparently well-founded belief that the tortious act was right, nor the exercise of any degree of care, constitutes a defense even in favor of a gratuitous bailee.¹ So, if the bailee delivers the property to one who claims title adversely to the owner, or who seeks possession with the object of destroying the property or using it in a manner inconsistent with the rights of the owner, the bailee is thereby guilty of a conversion.²

§ 87. **Wrongful Delivery by Gratuitous Bailee.**—Thus, a gratuitous bailee of stock is liable for its conversion if, without authority from the owner, he surrenders it to the officers of the corporation who cancel it and issue a new certificate to another person, even though its delivery had been occasioned by a forged order and the bailee acted in good faith.³ It will be noted that the good faith of the bailee, or his exercising reasonable care has nothing to do with his liability, for a bailee liable only for gross negligence is still liable for a conversion, and a mis-delivery by him, or a delivery contrary to the instructions of his bailor, will constitute such actual conversion.⁴ The rule is otherwise shown in the statement that a gratuitous bailee who delivers the subject of the bailment to an apparent stranger, without effort to verify the latter's claim to the property, and without inquiry as to its ownership, is liable to the real owner for the value of the property.⁵ The rules herein stated render a warehouseman

¹ *Hall v. Boston Railway*, 14 Allen 439, 92 A. D. 783, citing *Lawrence v. Simons*, 4 Barb. 354, *Esmay v. Fanning*, 9 Barb. 176, 5 How. Pr. 228.

² *Hicks v. Lyle*, 46 Mich. 488, 9 N. W. 529; *Savage v. Darling*, 151 Mass. 5, 23 N. E. 234.

³ *Hubbell v. Blandy*, 87 Mich. 209, 49 N. W. 502, 24 A. S. R. 154.

⁴ *Graves v. Smith*, 14 Wis. 5, 80 A. D. 763; see *Hill v. Hayes*, 38 Conn. 532.

⁵ *Wear v. Gleason*, 52 Ark. 364, 12 S. W. 756, 20 A. S. R. 186; citing *Schouler, Bailments*, 117-118; *Edwards, Bailments*, 99-162; *Nelson v. King*, 25 Tex. 655; *Dufour v. Mephram*, 31 Mo. 577; *Coykendahl v. Eaton*, 55 Barb. 193, 37 How. Pr. 438.

liable for the wrongful delivery of the property to a third person,¹ even though the warehouseman does not actually make the delivery but the third party removes the property with his knowledge and assent,² no liability, however, being imposed where the removal is without his knowledge and consent.³ But liability cannot be avoided by the bailee by showing that the delivery was made to an officer claiming the right to seize the property under a writ unless in fact the writ authorized the seizure;⁴ in other words, a defendant in such a case must show that the officer had a legal right to take the property by virtue of his writ.⁵

§ 88. Delivery by Bailee to One Whom he Found in Possession.

— But possession of property is *prima facie* evidence of ownership and the consequent right to possession, and it is, therefore, the rule that a bailee is not liable for a conversion in delivering goods to one whom he found in possession of them and who he had reason to believe and did believe was the owner of them.⁶ Some of the cases go so far as to say that the bailee may with impunity redeliver the property to one from whose possession he obtained it even after notice of the claims of the true owner.⁷ But in my opinion this latter holding is going too far in favor of the bailee, and the rule is not well supported by the authorities. Thus, it is said that a mere bailee is not guilty of conversion though he receive property from one not rightfully entitled to possession and, acting as a mere conduit, deliver it in pursuance of the bailment, if this be done before he has notice of the rights of the real owner; but if he has such notice, his position is altered and he delivers possession at his peril,⁸ especially if demand has been made upon him by the owner.⁹

§ 89. Where Goods Taken from Bailee by Officer.— As indicated above, if bailed property be taken from the bailee by an officer acting under a writ giving him authority to seize it, the former cannot be held for a conversion on account thereof.¹⁰ But the writ under which

¹ Alabama, etc. Ry. Co. v. Kidd, 35 Ala. 209; Jefferson Ry. Co. v. White, 6 Bush. 251; Collins v. Burns, 63 N. Y. 1.

² Lichtehein v. Boston Ry., 11 Cush. 70.

³ Kearney v. Clutton, 101 Mich. 106, 59 N. W. 419, 45 A. S. R. 394.

⁴ Edwards v. White Co., 104 Mass. 159, 6 A. R. 213.

⁵ Gibbons v. Farwell, 63 Mich. 344, 29 N. W. 855, 6 A. S. R. 301.

⁶ Nelson v. Iverson, 17 Ala. 216; Metcalf v. McLaughlin, 122 Mass. 84; Burditt v. Hunt, 25 Me. 419, 43 A. D. 289.

⁷ Strickland v. Barrett, 20 Pick. 415; see Metcalf v. McLaughlin, *supra*; Rembaugh v. Phipps, 75 Mo. 422.

⁸ Nanson v. Jacob, 93 Mo. 331, 6 S. W. 246, 3 A. S. R. 531; citing Cooley, Torts, 456; Dusky v. Rudder, 80 Mo. 400.

⁹ Rembaugh v. Phipps, 75 Mo. 422.

¹⁰ Clegg v. Boston Co., 149 Mass. 454, 21 N. E. 877, 14 A. S. R. 436; Burton v. Wilkinson, 18 Vt. 186; Pingree v. Detroit Co., 66 Mich. 143, 33 N. W. 298; Wells v. Thornton, 45 Barb. 390; Angell, Carriers, sec. 337a; Gibbons v. Farwell, 63 Mich. 344, 29 N. W. 855, 6 A. S. R. 301.

the officer acts may be legal and yet the property not be subject to seizure thereunder; and in such case it is no defense to the bailee that the property was taken from him by an officer.¹

§ 90. **Where Contract of Bailment is Void; Hiring Horses on Sunday.** — The most frequent cases of trover arising from the conversion of property originally obtained under a void contract have been those of the hiring of horses on Sunday, and some subsequent tortious act in relation to their use. Some early decisions held that in such a case no recovery could be had; that the conversion, in a way, grew out of the illegal contract, and that in order to make out his case the plaintiff must show such illegal contract, and the contract being invalid for all purposes, must necessarily release the defendant from any liability.² But such was not the holding of all courts, and many of them held, and practically all of the modern courts hold the opposite doctrine; and now the rule may fairly be said to be that a bailor may maintain an action for the conversion or injury of property bailed, even though the contract of bailment is void, for in such action he claims as general owner and not under the contract.³ The case of *Woodman v. Hubbard*,⁴ directly pertinent to the subject under discussion, is so clearly and fully argued that I shall take time to notice it somewhat at length. The case was for conversion by the immoderately overloading and driving of a horse hired on Sunday. Plaintiff had judgment, and in sustaining the judgment the appellate court said: "If the owner places his property in the hands of another to be used temporarily for an unlawful purpose, or in an unlawful way, though the contract which he makes respecting it be illegal and void, he does not forfeit his property in the thing which he has thus delivered to another on an illegal contract. . . . The property in the horse, therefore, remained in the plaintiff; and it would seem to follow as a necessary conclusion that for a direct, substantial invasion of that right, he might maintain the proper action against the defendant or a third person. In such an action he would not claim by or through the illegal contract, but would claim as the general owner of the horse, for an injury done to his right of property, which was antecedent to the contract, and not derived from it, nor defeated by it. The action of trover is founded

¹ *Kiff v. Railway Co.*, 117 Mass. 591, 19 A. R. 429.

² *Whelden v. Chappel*, 8 R. I. 230; *Gregg v. Wyman*, 4 Cush. 322; see *Parker v. Latner*, 60 Me. 528, 11 A. R. 210.

³ *Hall v. Corcoran*, 107 Mass. 251, 9 A. R. 30, overruling *Gregg v. Wyman*, *supra*; *Frost v. Plumb*, 40 Conn. 111, 16 A. R. 18; *Buchanan v. Smith*, 10 Hun 474; *Doolittle v. Shaw*, 92 Ia. 348, 60 N. W. 621, 26 L. R. A. 366; *Morton v. Gloster*, 46 Me. 420.

⁴ 25 N. H. 67, 57 A. D. 310.

upon the right of property in plaintiff and a conversion by the defendant. A conversion consists in an illegal control of the thing converted inconsistent with the plaintiff's right of property. . . . There can be no doubt, on the authorities, that trover would be a proper remedy in this case if the illegality of the contract on which the defendant took the horse into his possession had not been set up as a defense. If, however, there has been in this case a technical legal conversion, the real and substantial claim of the plaintiff is to recover damages for the breach of the illegal contract; if he must, in fact, notwithstanding the form of his action, claim by and through his contract, he cannot evade the consequences of his illegal act by adopting a fictitious action allowed in ordinary cases for the purposes of the remedy. . . . The question then becomes material whether the only real injury which the plaintiff suffered was by a breach of the contract; or whether the driving of the horse to another place was a substantial invasion of the plaintiff's right of property. When the defendant voluntarily drove the horse beyond the limits for which he was hired, he acted wholly without right. He then took the horse into his own control, without any authority or license from the owner. The conversion in law was as complete, the invasion of the plaintiff's right of property was as absolute as if, instead of driving the horse a few miles beyond the place for which he had hired him, he had retained and used him for a year, or any other indefinite time, or had driven him to market and sold him. If taking the wrongful control of the horse and driving him ten miles was not a substantial conversion, how far must the defendant have driven him? How long must he have detained him? And what other and further wrongful act was it necessary that he should do in order to make himself a substantial and real wrong-doer? It would seem to be quite clear that if the original act, assuming control over the horse, was not a substantial invasion of the plaintiff's right of property, no subsequent use or abuse of the horse by the defendant could make it so; and that if the defendant cannot on the facts of this case be charged for the conversion of the horse, he could not if he had sold or willfully destroyed him. In other words, the plaintiff, having delivered the horse into the defendant's hands on a contract that was illegal, but which nevertheless left the general property in the plaintiff, the defendant may do what he will with the horse and the plaintiff can have no remedy, because whatever he does can be no more than a breach of his unlawful contract to return the horse. This does not appear to be a reasonable conclusion. . . . If the plaintiff made the illegal contract respecting the horse, that contract

is void; but the illegal contract, being for a temporary use of the horse, the consequences do not extend to a forfeiture of the plaintiff's right of property. . . . The plaintiff's claim is neither in form nor in substance by, through or under the illegal contract, and the invalidity and illegality of the contract are no defense to the suit. The contract is no link in the plaintiff's case; he shows the contract, which was invalid and illegal; but notwithstanding the contract, and in spite of it, his right of property remained. The right has been directly invaded by the defendant's wrongful act, and this action is the appropriate remedy. . . . Was the act of the defendant within the limits and scope of the contract, and a mere breach of it? If so, he is not liable. But if the act was not covered by the contract and done within it and under it, but was a direct, voluntary wrong to the plaintiff's right of property, he may recover. It necessarily follows from this view of the case that a man is wholly without remedy for an injury that may be done to a horse that he lets on Sunday in violation of law if the necessity of showing his illegal contract will preclude his recover. Though the property is conceded to remain in the plaintiff, he has no remedy to enforce his right because he cannot show it without showing the illegal contract of letting. And in all the numerous cases where horses are illegally let on Sunday, the hirer might with perfect impunity retain or sell them. This appears to us to be pushing the application of a well-settled principle to an unnecessary and extravagant length not required nor warranted by the general current of the authorities."¹

§ 91. Failure or Refusal of Bailee to Deliver or Return Property. — The conversion of property by a bailee by his failure or refusal to return it will be treated generally in a later chapter under the title of Demand and Refusal of Possession.² Here, however, it is desired to notice some instances in which bailees have, and some in which they have not been held liable for such failure or refusal. It is the general rule that a wrongful detention of goods by a depositary or bailee, or a refusal to deliver them after a demand, or even an attempt to set up title in a third person, will constitute a conversion of the property.³ But it is not every detention that will constitute such a conversion. It must be wrongful and unreasonable. For where property has been deposited with a person for any purpose, and a

¹ *Dwight v. Brewster*, 1 Pick. 51, 11 A. D. 133; *Lewis v. Littlefield*, 15 Me. 233; *Phalen v. Clark*, 19 Conn. 421, 50 A. D. 253; *Campbell v. Stokes*, 2 Wend. 137, 19 A. D. 561; all cited in *Woodman v. Hubbard*, *supra*.

² *Post*, Chapter VI.

³ *Edwards on Bailments*, 2d ed. 42–58–62; *Doherty v. Madgett*, 58 Vt. 323; *Holbrook v. Wight*, 24 Wend. 169; *Bradley v. Spofford*, 23 N. H. 444.

person other than the bailor demands possession of the bailee, the latter is not liable in trover until after a reasonable time and opportunity are given him to ascertain the justness of the claims of the person making the demand.¹ But in order to exempt the bailee from liability, his refusal must be qualified in some manner. It is said that a demand and refusal do not of themselves constitute a conversion, but are evidence of it; and every person in possession of property has the right to retain it until it is demanded by some person having, and, if required, producing proof of competent authority to demand it. If the refusal to deliver do not turn upon the supposed want of authority of the demandant, or if the possessor waive inquiry into such authority, or admit its sufficiency, and put his refusal upon another and distinct ground which cannot, in point of law, be supported, then the refusal under such circumstances is presumptive evidence of a conversion. If, for instance, the party puts his refusal upon the ground that the property is his own, or that he has a lien upon it, and such claim is unfounded; or if his objection to a delivery be frivolous or fraudulent, then he cannot shelter himself from the legal presumption of a conversion which his unjust refusal authorizes. Whoever undertakes tortiously to deal with the property of another as his own, or tortiously detains it from the owner is in contemplation of law guilty of a conversion.²

§ 92. **Same Subject; Reasonable Refusal no Conversion.** — A refusal to deliver property may, from a misapprehension of law, be reasonable and so prevent its having the effect of a conversion. So, where one having in his possession notes for collection was summoned by trustee process, in an action instituted against his principal, and because of such process refused to deliver the notes upon order of his principal, there was held to have been no conversion.³ And it is said that while it is the general rule that any person who is in possession of another's property is bound to surrender it upon demand, yet the exceptions are where a person really and *bona fide* does not know that the demandant is the owner. And it is said further that the exceptions are founded in good sense, and it must appear in the transaction that the bailee neither claims possession for himself nor even for his bailor, but only that he wishes a delay to enable him to return it to the bailor that the latter might exercise his free will and not condemn the bailee for not doing so, and that the bailee might

¹ *State v. Stevenson*, 46 N. J. L. 326; *Carroll v. Mix*, 51 Barb. 212; *Butler v. Jones*, 80 Ala. 436; see *Singer Co. v. King*, 14 R. I. 511; *Ward v. Moffett*, 38 Mo. App. 395.

² Judge Story in *Watt v. Potter*, 2 Mason 78.

³ *Fletcher v. Fletcher*, 7 N. H. 452, 28 A. D. 359, citing *Robinson v. Burleigh*, 5 N. H. 225.

thus avoid a law-suit. When one is in possession under a bailment, by holding for the bailor and refusing to deliver the thing bailed upon demand, he identifies his possession with the title of the bailor, and if that is bad the possession is a conversion.¹ A refusal by a warehouseman to deliver the property stored with him to an assignee of the bailor, except upon production of the warehouse receipt or the giving of an indemnity, has been held not to amount to a conversion.² In a case of bailment of promissory notes and receipts, a demand was made upon the bailee for possession, and he replied that he had no claim upon the property but that he would not give it up until he ascertained to whom it belonged. He was absolved from liability in an action against him for a conversion.³ But the opposite conclusion was reached where the bailee replied to the demand that he had no doubt that the property belonged to the demandant but that he would not give it up on account of the claims of others.⁴

§ 93. **Same Subject; What Refusal Amounts to Conversion.** — But a refusal to deliver property on demand because the one in possession doubts the authority of the person making the demand must be placed distinctly on that ground.⁵ And the holder must make prompt and reasonable inquiry to ascertain the true ownership of the property in question; and if it appear that after demand for possession he did not make inquiries as to the title to the property, and that he did not have reason to believe that it belonged to any one other than the demandant, then his detention of the property is unjustifiable.⁶ The rule here being discussed has been carried to a considerable length in cases where merchants have failed to return property belonging to customers which has been left in their care. Thus, in one case a customer, at the suggestion of a salesman, took off his watch which was placed in a drawer while the customer was trying on clothing, from which drawer the watch was stolen. It was held that the merchant, by failing to return the watch, rendered himself liable to the customer for its value.⁷ The same liability was imposed on a merchant in favor of a customer who had laid aside her

¹ *Dowd v. Wadsworth*, 2 Dev. Law 130, 18 A. D. 567.

² *Patten v. Baggs*, 43 Ga. 167.

³ *Zachary v. Pace*, 9 Ark. 212, 47 A. D. 744; but the rule is in this case said to be otherwise if the bailee has not sufficient grounds to doubt demandant's title.

⁴ *Doty v. Hawkins*, 6 N. H. 247, 25 A. D. 459.

⁵ *Ingalls v. Bulkley*, 15 Ill. 224; *Nutter v. Varney*, 64 N. H. 611, 5 Atl. 457; *Briggs v. Haycock*, 63 Cal. 343; *Dusky v. Rudder*, 80 Mo. 400; *Ingersoll v. Barnes*, 47 Mich. 104, 10 N. W. 127.

⁶ *Ball v. Liney*, 48 N. Y. 6, 8 A. R. 511; see *Boies v. Hartford Co.*, 37 Conn. 272; *Dunn v. Branner*, 13 La. Ann. 452; *Cumins v. Wood*, 44 Ill. 416.

⁷ *Woodruff v. Painter*, 150 Pa. 91, 24 Atl. 621, 16 L. R. A. 451; see *Newhall v. Paige*, 10 Gray 366 — an extreme case.

old cloak in the store while trying on a new one and from which place the old cloak was stolen.¹ These cases, however, seem to hold the bailees liable more on the principle of negligence than of a conversion. Somewhat contrary to such holding, it is said that a refusal to return goods is not a conversion if the bailee did not have power to comply with the demand, as where the goods had previously been lost, stolen, or forcibly taken from his possession without his consent.²

6. EXECUTORS AND ADMINISTRATORS

§ 94. **When Liable as Such and When Individually.**—An executor or administrator derives his authority from the law and is independent of the control or interference of the heirs or other persons interested in the property intrusted to him. From this it necessarily follows that where he acts outside the authority conferred upon him by virtue of his appointment, he acts individually and must be held individually liable to those persons who are injured by his acts. For it is the rule that neither an administrator nor an executor, as such, can commit a tort. And, included in this rule, is the doctrine that an executor or administrator cannot, as such, be held in trover for a conversion committed by him.³ But he is answerable in his individual capacity for a conversion, even where the property came into his hands as a part of the estate of the decedent, if he has unlawfully withheld it from the owner after a proper demand by the latter, or after any other act the commission of which amounts in law to a conversion by the representative.⁴ If, as indicated, the wrongful withholding of property has been done by the decedent, and his personal representative also, after a demand, refused to surrender possession or was guilty of a conversion in any other manner, the latter could be held in trover, either personally or in his representative capacity.⁵ It will be noted that the time of conversion is important in determining the extent of the liability of an executor or administrator. If the decedent had been guilty of no wrong respecting the property in controversy, but the wrong was inflicted by the personal representative, the latter cannot be held officially and the estate cannot be made responsible for such act,⁶

¹ *Bunnell v. Stern*, 122 N. Y. 539, 25 N. E. 910, 10 L. R. A. 481; see *Reitzenstein v. Marquardt*, 75 Ia. 294, 39 N. W. 506, 1 L. R. A. 318; *Prince v. State Fair*, 106 Ala. 340, 17 So. 449, 28 L. R. A. 716.

² *Dearbourn v. Bank*, 58 Me. 273; *Hill v. Belasco*, 17 Ill. App. 194; *Yale v. Saunders*, 16 Vt. 243; *Abraham v. Nunn*, 42 Ala. 51.

³ *Daily's Admr. v. Daily*, 66 Ala. 266.

⁴ *Underhill v. Morgan*, 33 Conn. 105; *Farrelly v. Ladd*, 10 Allen 127 (Mass.).

⁵ *Prescott v. Ward*, 10 Allen 203 (Mass.).

⁶ *Parker v. Barlow*, 93 Ga. 700, 21 S. E. 213.

although an apparent exception has been made where the property has been appropriated to the use of the estate.¹ A statute declaring that an action of trover should survive for and against an executor or administrator was construed to mean that they could be held in their representative capacity where a conversion had taken place in the life-time of the decedent.² But where the property was merely in the hands of the decedent in his life-time, and the administrator converted it by a wrongful sale, the latter was held personally liable.³ And where a conversion had taken place in the life-time of the decedent, trover was sustained against the personal representative even though the property had never come into his possession.⁴

7. CARRIERS OF GOODS

§ 95. **Duties of Carriers, in General.**—Carriers of goods are bailees of such a character that they owe certain duties to the public. They undertake generally, and not as a casual occupation, and for all people indifferently, to convey goods and deliver them at a place appointed for hire as a business, and with or without a special agreement as to price. As they hold themselves out to the world as common carriers for a reasonable compensation, they assume to do and are bound to do what is required of them in the course of their employment, if they have the reasonable convenience to carry and are offered a customary price; and if they refuse without some just ground, they are liable to an action.⁵ Common carriers are in the nature of insurers, and are answerable for accidents and thefts and even for a loss by robbery. They are answerable for all losses that do not fall within the excepted cases of the act of God (meaning inevitable accident without the intervention of man), and public enemies.⁶ The duty further devolves upon them to carry the goods intrusted to them to the place designated, to carry them along the regular stipulated route, and to deliver them at their destination to the right person.

§ 96. **Same Subject.**—And, while it is the rule that a common carrier is obliged to receive and carry all goods offered, yet this rule is qualified by some important conditions which carriers have a right to insist upon before accepting the goods for transportation. And one of the most important of these conditions is that the one offering

¹ *Leigh v. Cockwood*, 4 Dev. 577.

² *Nations v. Hawkins Admr.*, 11 Ala. 859.

³ *Yeldell v. Shinholster*, 15 Ga. 189.

⁴ *Ferrill v. Brewis*, 25 Gratt. (Va.) 765.

⁵ 2 *Kent's Com.* 599.

⁶ *Id.* 597.

the goods for transportation has the right and authority to do so, for without such right and authority the carrier may properly refuse to receive them; and where an adverse title is made known to the carrier, it is its duty to refuse to receive the goods. But if the carrier should wrongfully receive the goods, or accept them without the consent of the owner, express or implied, and, on demand, refuse to deliver them to the owner or other person lawfully entitled to them, then the owner may maintain either replevin for possession of the property or trover for its value. It is now my purpose to discuss the instances in which a conversion has or has not occurred from the conduct of a common carrier in its dealings with goods intrusted to it for transportation.

§ 97. **Deviation by Carrier from Regular or Authorized Route.** — It is the duty of a common carrier to transport freight over the route designated by the shipper. If it fail to do this, but send the freight over some other route, it is liable to the shipper or owner for all damages to the property shipped which is caused by reason of such deviation. But when such liability has attached, the courts are not agreed as to what is the proper form of action to enforce it. Most of them, it is believed, have held case or an action for negligence to be the proper form of remedy.¹ But in a Georgia case where the proper form of action was the only question before the appellate court, it was held that by such deviation a conversion had occurred and that the carrier was liable in trover. In this case the property consisted of bales of cotton alleged to have been converted by a steamship company. The cotton was lying at plaintiff's landing on a river for shipment to Savannah. The captain of the steamboat, in his passage up the river took the cotton aboard without the knowledge or authority of the plaintiff. The boat went further up the river, taking on freight, and after obtaining a load returned toward Savannah; but before reaching plaintiff's landing the boat ran on a snag in the river, and in the attempt to run her ashore the boiler exploded and the boat and cotton were burned. The defendant, at the close of plaintiff's evidence, moved for a non-suit on the ground that case, and not trover, was the proper remedy. The motion was granted by the trial court. In the appellate court it was said: "Was the non-suit right? If the evidence was sufficient to authorize the jury to find that there was a conversion, the non-suit was wrong. We think that the evidence was sufficient to authorize the jury to

¹ See *Hand v. Baynes*, 4 Whart. (Pa.) 204, 33 A. D. 54; *Crosby v. Fitch*, 12 Conn. 410, 31 A. D. 745; *Souter v. Baymore*, 7 Pa. St. 415, 47 A. D. 518; *Sayer v. Portsmouth, etc. Co.*, 31 Me. 228, 50 A. D. 659, a case of assumption.

find a conversion. If the boat took the cotton from the river bank without authority, that, it is clear, was a conversion. And the evidence was, perhaps, sufficient to authorize the jury to find that the boat did so take the cotton. If the boat took the cotton by agreement, but an agreement to carry the cotton to Savannah, and instead of going the ordinary route, and while out of the ordinary route the cotton was lost, there was a conversion. It would be a breach of the contract by mis-conduct—something positive. And every such breach of such a contract is a conversion.”¹

§ 98. **Failure or Refusal of Carrier to Deliver Goods.** — A common carrier becomes a bailee of the property intrusted to it for transportation, and as against the bailor who had possession at the time of delivery, the carrier cannot refuse to deliver the property at the conclusion of the bailment on the ground of title in a third person, even though the latter be the true owner, in order to gain the property for itself or for any other purpose unless it be that it has yielded possession to a paramount title. The carrier's first responsibility is to the person who intrusted the property to it. And its primary duty is to deliver the property in accordance with the directions of the shipper. But a conversion implies some wrongful act, some mis-delivery, a wrongful disposition, or withholding of the property. A mere non-delivery will not constitute a conversion nor will a refusal to deliver on demand if the goods have been lost through negligence or have been stolen,² or, as it is sometimes said, if it is out of the carrier's power to deliver. An action of trover cannot be predicated on negligence; there must be a mis-feasance, a wrongful dealing with the property in a manner inconsistent with the duties of a carrier or the rights of a shipper; as where the carrier, having possession, refuses to deliver goods according to contract. Therefore, if the goods are lost or stolen so that the carrier cannot deliver them, and its inability does not arise from any act of its own, trover will not be sustained.³ The reason is that mere non-feasance does not work a conversion.

§ 99. **Same Subject; Amounts to a Conversion.** — It is the general rule, however, subject to several important exceptions to be presently noted, that if the carrier wrongfully withholds the goods and refuses to deliver them to the shipper or consignee, it will be held

¹ *Phillips v. Brigham*, 26 Ga. 617, 71 A. D. 227; see, generally, *in re Peterson*, 21 Fed. 885; *Goddard v. Mallory*, 52 Barb. 87; *U. S. Express Co. v. Keefer*, 59 Ind. 263; *Whitney v. Merchant's Co.*, 104 Mass. 152; *Merrick v. Webster*, 3 Mich. 268; *Maghee v. Camden Road*, 45 N. Y. 514.

² *Maguin v. Dinsmore*, 70 N. Y. 410, 26 A. R. 608.

³ *Packard v. Getman*, 4 Wend. 613, 21 A. R. 166.

in trover for a conversion.¹ Thus, where goods had been sent carriage prepaid, but the carrier refused to deliver them except upon payment of an additional charge, such refusal constituted a conversion of the goods.² But a refusal may be excused where delivery of the property has been made to one lawfully entitled to it, as where the real owner, being other than the bailor, appears and claims the property and it is delivered to him by the carrier, so that upon demand of the bailor the carrier is unable to deliver to him. While this phase of the subject will be discussed more fully in succeeding sections under the title of Conversion by Wrongful Delivery,³ it is appropriate to here give some notice to it. One court has used this language: "It may be correct enough to hold that when the real owner does not appear and assert his right, the carrier or bailee shall not be permitted of his own mere motion to set up as a defense against his bailor such right for him. But it would be repugnant to every principle of honesty to say that after the right owner has demanded the goods of the bailee, he shall not be permitted in any action brought against him by the bailor of the goods, to defend against his claims by showing clearly and conclusively that the plaintiff acquired possession of the goods tortiously and feloniously without having obtained any right thereto. As a general rule a bailee cannot set up a right of property in a third person to defeat a recovery by his bailor. But this rule is subject to many exceptions; the defendant in such suit may show that the property has been taken from him by due process of law or by a person having a paramount title. Nor are these the only exceptions. We are strongly disposed to think that the right of the true owner may be set up in all cases when upon his demand the property has in fact been delivered to him before the commencement of the suit."⁴ The rule is more tersely stated to be that when the owner demands his property, he is entitled to its immediate delivery, and it is the duty of the possessor to make such delivery; and the law will not judge the performance of such duty tortious against a bailor having no title. And if the owner demands the property of a carrier and the latter refuses to deliver it, an action of trover for its conversion may be maintained.⁵

¹ *Savannah Co. v. Sloat*, 93 Ga. 808, 20 S. E. 219, 61 A. & E. Railway cases, 207.

² *V. A. & Eng. Enc. L.* 389, citing *Loeffler v. Keokuk Line*, 7 Mo.-App. 185; *Waite v. Gilbert*, 10 Cush. 177; *Ill. Cent. Ry. Co. v. Brookhaven Co.*, 71 Miss. 663, 16 So. 252.

³ §§ 105, *et seq.*

⁴ *King v. Richards*, 6 Whart. (Pa.) 418, 37 A. D. 420.

⁵ *Western Trans. Co. v. Barber*, 56 N. Y. 544; *Powell v. Robinson*, 76 Ala. 423; *Wells v. Am. Ex. Co.*, 55 Wis. 23, 11 N. W. 537, and 12 N. W. 441, 42 A. R. 695.

§ 100. **Same Subject; Delivery to Consignee Before Notice of Claim of Another.** — But if the carrier has delivered goods to the consignee before notice that the bailor is the true owner and, consequently, before a demand by the consignor and a refusal of delivery by the carrier, the latter cannot be held for a conversion.¹ But if the carrier has delivered the property to a third person claiming to be the owner, and it is afterward made to appear that the bailor was the true owner and makes a demand for the property, the carrier will be held liable to the bailor for a conversion. Hutchinson, in his work on Carriers,² in speaking of the liability of carriers under such circumstances, says: "In such cases, however, if it should turn out that such claimant has not the paramount title as against the bailor, the withholding of the goods by the carrier from the latter will be treated as a conversion by him, and so when a demand is made upon him by the adverse claimant, if the carrier should refuse to surrender the goods to him he will be equally guilty of a conversion, if the title of such claimant should prove to be the better, and he, as the true owner, was really entitled to them. Where, however, the title to the property is disputed, and it becomes difficult or impossible for the carrier to determine who is entitled to them, he may be placed in a perilous position, for no matter to which he gives up the goods, whether to the bailor or in pursuance of his directions, or to the adverse claimant, he will be in danger of being held to account for them to the other as for a conversion, if he can show the better title. Under such circumstances, it sometimes becomes advisable for the carrier, instead of taking it upon himself to determine between the conflicting claims, to bring the parties before the proper tribunal by a bill of inter-pleader in order that the parties may litigate the question of title *inter se*, and have it there determined. He may, however, generally avoid the expense and delay of such a proceeding by delivering the property to the party who seems best entitled to it, upon being indemnified by him against loss in case it turn out otherwise."

§ 101. **Duty of Carrier as to Conflicting Claimants of Goods.** — Courts have met with considerable embarrassment in cases where common carriers have been put in a position where it was necessary for them to judge between conflicting claimants to property placed with them for transportation. The specific question usually presented is whether a common carrier who has received goods for transportation from one person, and given him a bill of lading therefor, is bound to surrender them upon demand to a third person who

¹ *Sheridan v. New Quay Co.*, 4 Com. B. N. S. 618.

² Sec. 407.

claims to be the true owner thereof, under pain of being liable to an action for the conversion of said goods at the suit of such third person. It may be conceded that there is some conflict among the decisions as to the liability of the carrier in such a situation. The South Carolina court has held that the refusal of the carrier to surrender the goods to a third person claiming to be the true owner will not make the carrier liable for a conversion of such goods at the suit of such third person; but that the carrier may, if it chooses to do so, deliver the goods to the rightful owner, and then defend an action by the bailor to recover for a non-delivery to him by showing such delivery to the third person. In the course of an opinion, the court say: "It seems to us that common justice would require that such burden should be assumed by the claimant, who is most likely to have the means of meeting it, and not upon the carrier, who cannot be supposed to know anything about the real ownership of the goods and has a right to assume that the person from whom he received possession of the goods was such rightful owner, possession of personal property being evidence of title."¹ Apparently in direct opposition to this holding is the doctrine of the Nebraska court,² in which the South Carolina case is criticised, and there it is said that the pronounced weight of the authorities sustains the proposition that a refusal to surrender to the rightful owner amounts to a conversion for which the latter may recover, if entitled to possession at the time of demand. In an early Massachusetts case, it was said in support of this last-named doctrine: "There is no case to be found or any reason or analogy suggested in the books, which would go to show that the real owner was concluded by a bill of lading, not given by himself, but by some third person erroneously or fraudulently. If the owner loses his property, or is robbed of it, or it is sold or pledged without his consent, by one who has only a temporary right to its use, by hiring or otherwise, or a qualified possession of it for a specific purpose, as for transportation or work to be done upon it, the owner can follow and reclaim it of any person however innocent. . . . Why should the carrier be exempt from the operation of this universal principle? Why should not the principle of *caveat emptor* apply to him? The reason, and the only reason, given is that he is obliged to receive goods to carry, and should therefore have a right to retain the goods for his pay. But he is not bound to

¹ Kohn v. Richmond Co., 37 S. C. 1, 16 S. E. 376, 34 A. S. R. 726, 24 L. R. A. 100.

² Shellenberg v. Freemont, etc. Co., 45 Neb. 487, 63 N. W. 859, 50 A. S. R. 561, citing Wells v. Am. Ex. Co., 55 Wis. 23, 11 N. W. 537, and 12 N. W. 441, 42 A. S. R. 695; Western Trans. Co. v. Barber, 56 N. Y. 544; "The Idaho", 93 U. S. 575; Hutchinson on Carriers, 406-407.

receive the goods from a wrong-doer. He is only bound to receive goods from one who may rightfully deliver them to him, and he can look to the title as well as persons in other pursuits and situations in life.”¹

§ 102. *Same Subject; Applying Rule of Caveat Emptor.* — It seems to me that the fallacy of the South Carolina doctrine is that it does not apply the rule of *caveat emptor* to the case of carriers receiving for transportation goods from bailors who have no right to deliver them to the carriers, and that the doctrine seeks to create a distinction between those cases where the carrier has already delivered the property to the true owner and those cases where a demand has been made by the third person but no delivery made at the time demand for possession is made by the bailor. The United States case of “The Idaho” is frequently cited in discussions of the principles herein spoken of.² In that case it was said: “When the bailee has actually delivered the property to the true owner, having the right of possession on his demand, it is a sufficient defense against the claim of the bailor. If it be said that by accepting the bailment the bailee has estopped himself against questioning the right of his bailor, it may be remarked in answer that this is assuming what cannot be conceded. Undoubtedly the contract raises a strong presumption that the bailor is entitled. But it is not true that the bailee thereby conclusively admits the rights of the principal. His contract is to do with the property committed to him what his principal has directed, to restore it or to account for it. And he does account for it when he has yielded it to the claim of one who has a right paramount to that of his bailor. If there is any estoppel, it ceases when the bailment on which it is founded is determined by what is equivalent to an eviction by title paramount; that is, by the reclamation of possession by the true owner. Nor can it be maintained, as it has been argued in the present case, that the carrier can excuse himself for failure to deliver to the order of the shipper only when the goods have been taken from his possession by legal proceedings, or where the shipper has obtained the goods by fraud from the true owner. It is true that in some of the cases fraud of the shipper has appeared, and it has sometimes been thought it is only in such a case, or a case where legal proceedings have interfered, that the bailee can set up the *jus tertii*. There is no substantial reason for the opinion. No matter whether the shipper has obtained the possession

¹ Robinson v. Baker, 5 Cush. 137; to the same effect see the well considered case of King v. Richards, 6 Whart. (Pa.) 418, 37 A. D. 420.

² 93 U. S. 575-579, 23 L. Ed. 978.

he gives to the carrier by fraud practiced upon the true owner, or whether he mistakenly supposes he has rights to the property, his relation to the bailee is the same. He cannot confer rights which he does not himself possess, and if he cannot withhold possession from the true owner, one claiming under him cannot. The modern and best-considered cases treat as a matter of no importance the question how the bailor acquired the possession he has delivered to his bailee, and adjudge that if the bailee has delivered the property to one who has the right to it as the true owner he may defend himself against any claim of his principal."¹

§ 103. **Same Subject; Qualified Refusal is No Conversion.** — But when a demand is made upon a carrier for possession of goods in his keeping by a person other than his bailor or consignee, or by either of the last two when the carrier has been notified of adverse claims to the property, the carrier will be allowed to hold the goods a sufficient length of time to investigate in good faith and to satisfy his honest doubts as to their ownership without rendering himself liable in trover by reason of such detention.² Otherwise said, the rule is that a qualified refusal by a common carrier to deliver goods on demand of one entitled to them does not constitute a conversion if the qualification is reasonable and in good faith.³ The duties of carriers may be varied by different circumstances of cases as they arise; but it is their duty in all cases to be diligent in their efforts to secure a delivery of the property to the person entitled, and they will be protected in refusing delivery until reasonable evidence is furnished them that the party claiming is the party entitled, so long as they act in good faith and solely with a view to a proper delivery.⁴

§ 104. **Burden of Proof.** — If the carrier attempts to justify the delivery of the goods to a third person on the ground that he was the true owner, the burden is upon the carrier to establish such fact.⁵

§ 105. **Wrongful Delivery by Carrier.** — No obligation of a carrier is more rigorously enforced than that which requires property transported by it to be delivered to the right person; and the law will hear no excuse for a breach of this obligation and a wrongful delivery, except the fault of the shipper himself. If the delivery be to a wrong person, either by an innocent mistake or through fraud of third

¹ See *King v. Richards*, 6 Whart. (Pa.) 418, 37 A. D. 420; *Young v. East, etc. Co.*, 80 Ala. 101; *Hayden v. Davis*, 9 Cal. 573; *Am. Ex. Co. v. Greenhalgh*, 80 Ill. 68.

² *Holbrook v. Wight*, 24 Wend. 169, 35 A. D. 607.

³ *McEntee v. The N. J. S. Co.*, 45 N. Y. 34, 6 A. R. 28.

⁴ *Id.*

⁵ *Cleveland, etc. Co. v. Moline Plow Co.*, 13 Ind. App. 225; *Am. Ex. Co. v. Greenhalgh*, 80 Ill. 68; *Young v. East. Ala. Co.*, 80 Ala. 100.

persons, the carrier will be responsible and the wrongful delivery will be held a conversion of the property.¹ The undertaking of the carrier is to transport the goods, with the further duty of delivering them to the right party as designated by the terms of the shipment, and there are no conditions that will release it from this obligation of making a proper delivery, except such as would also release it from a safe carriage of the goods.² The almost universal rule by which the carrier protects himself from a liability for a wrongful delivery is to require the production of a bill of lading before making a delivery. In fact it has been said to be the duty of a carrier to ascertain whether a bill of lading has been issued to the shipper, and if so, to retain the property until it is claimed by one under such instrument, and to deliver in accordance therewith.³ The bill of lading is the carrier's contract by which he agrees to deliver the property to the person and at the place named therein; and if it delivers the property to any other, such delivery will be held a conversion, unless the carrier can show that the person to whom delivery was made was in fact entitled to such delivery. It is said that bills of lading are regarded as so much cotton, grain, iron or other articles of merchandise. They are in commerce a very different thing from bills of exchange and promissory notes, answering a different purpose and performing different functions. They are not representatives of money; used for transmission of money, or for the payment of debts or for other purchases. They do not pass from hand to hand, as bank-notes or coin. They are contracts for the performance of certain duties. They are in fact, symbols of ownership of the goods which they cover — representatives of those goods.⁴ A bill of lading is, in general, assignable by the consignee, and sometimes by the consignor, so as to render the carrier liable to make delivery to the assignee; and it is, therefore, held to be a reasonable regulation to require the production of the bill of lading as a condition of delivery, even to the consignee.⁵

§ 106. **Same Subject; Delivery to be According to Bill of Lading.** — It has been held that there can be no delivery of the property except in accordance with the bill of lading;⁶ and that when such bill of lading is properly endorsed it operates as a delivery of the prop-

¹ *Furman v. Union Pac. Co.*, 106 N. Y. 579; *Jeffersonville Ry. Co. v. White*, 6 Bush 251; *Powell v. Meyers*, 26 Wend. 290; *Wernwag v. Phila. Ry.*, 117 Pa. St. 46, 11 Atl. 868; *Bowlin v. Nye*, 10 Cush. 418; *Matteson v. N. Y. Cent.*, 76 N. Y. 384.

² *North Pa. Ry. Co. v. Commercial Bank*, 123 U. S. 727.

³ *Dows v. Milwaukee Bank*, 91 U. S. 618; *City Bank v. Railway Co.*, 44 N. Y. 136; "The Thames", 14 Wall. 98.

⁴ *Shaw v. Railroad Co.*, 101 U. S. 557; see *Hutchinson, Carriers*, 348.

⁵ *Boss v. Glover*, 63 Ga. 746.

⁶ *Stollenwerck v. Thatcher*, 115 Mass. 224; *Dows v. Bank*, 91 U. S. 618.

erty, investing the indorsee with a constructive custody, which serves all purposes of an actual possession, and so continues until there is a valid and complete delivery of the property under and in pursuance of the bill of lading and to the person entitled to receive the same.¹ Carriers must recognize transfers of bills of lading, and unless protected by proper vouchers, cannot always assume to deal with consignments as actually and beneficially belonging to the consignee.² The carrier will be liable if he delivers the property to the consignee while the bill of lading is in the hands of a third person who has advanced money upon it.³ And it is immaterial that prior to such advance of money the carrier has improperly parted with possession of the property, as such improper delivery will not relieve the carrier from its duty to the indorsee of the bill of lading.⁴ If the bill of lading provides for a delivery of the property to the consignee upon presentation of a duplicate, the carrier will be liable in case it delivers without production of such duplicate.⁵ In such case, the carrier is liable in trover for the value of the goods to a *bona fide* holder of the bill of lading who procured it for value before delivery of the goods at their destination.⁶ In one case the carrier delivered the goods to one who had no authority to receive them, but on his representation that he held the bill of lading which, however, he did not produce. The carrier was held liable as for a conversion.⁷ And the same liability was imposed where the carrier delivered the goods in violation of an express notice not to make such delivery without production of the bill of lading.⁸ It is no justification for a wrongful delivery that the one to whom the carrier delivered the property gave an undertaking to surrender the bill as soon as he got it.⁹

§ 107. Carrier Must Demand Production of Bill of Lading.—While the carrier cannot with impunity deliver the goods transported by it except upon production of the bill of lading, yet on the

¹ *Heiskell v. Bank*, 89 Pa. St. 155, 33 A. R. 745.

² *Walker v. Detroit Co.*, 49 Mich. 446, 13 N. W. 812; *St. Louis Co. v. Larned*, 103 Ill. 293; *Merchant's Co. v. Merriam*, 111 Ind. 6, 11 N. E. 954; *Garden Bank v. Hunnerton Co.*, 67 Ia. 526, 25 N. W. 761; *Union Stock Yards v. Westcott*, 47 Neb. 300, 66 N. W. 419.

³ *Alderman v. East. Ry. Co.*, 115 Mass. 223.

⁴ *First Nat'l Bank v. N. Y. etc. Co.*, 85 Hun 160.

⁵ *McEwen v. Jeffersonville, etc. Co.*, 33 Ind. 368, 5 A. R. 216; *Jeffersonville, etc. Co. v. Irvin*, 46 Ind. 180.

⁶ *Midland Bank v. M. K. & T. Co.*, 62 Mo. App. 531; *First Nat'l Bank v. Northern Co.*, 58 N. H. 203; *Union Co. v. Johnston*, 45 Neb. 57, 63 N. W. 144; *Bank of Batavia v. New York Co.*, 106 N. Y. 195, 12 N. E. 433, 60 A. R. 440; *Penn. Ry. Co. v. Stern*, 119 Pa. 24, 12 Atl. 756.

⁷ *Forbes v. Boston Co.*, 133 Mass. 154.

⁸ *Foggan v. Lake Shore Co.*, 40 N. Y. S. R. 718.

⁹ *Merchants Bank v. Union Co.*, 69 N. Y. 373.

other hand it cannot always safely deliver the goods to him who has merely the possession of such bill of lading. The holder must be a rightful holder. Thus, where the shipping receipts were stolen by the consignee, who procured bills of lading upon them which he transferred for value, the carrier was held liable for delivering the goods under the bill of lading against the orders of the consignor.¹ And the same liability is incurred by a delivery to a holder who obtained the bill of lading through fraud.² Furthermore, if the goods are deliverable to the shipper's order, the carrier has no right to deliver to any person unless he proves his right to the property by producing the bill of lading properly indorsed. And if the carrier deliver without such bill of lading, or without a proper indorsement of same, it will be liable to the true owner of the property or to one having the actual possession of the bill of lading as collateral security.³ Also, where there are directions in a bill of lading to notify a certain person of the arrival of the goods at the place of destination, such directions do not constitute authority for the carrier to deliver the goods to the person so to be notified, without production by him of the bill of lading properly indorsed.⁴ Neither can a carrier justify a wrongful delivery by showing that it was made to the general agent of the consignor, where the terms of the shipment were that delivery should be made to the consignor or his order.⁵ Nor can the carrier escape liability where it has delivered the property to a person who merely produced a telegram from the sheriff to stop the property and that the sheriff would arrive on the next train with an attachment.⁶ The carrier will be liable if, in violation of positive instructions, it delivers property to the consignee without payment by the latter of a draft forwarded against the bill of lading.⁷

§ 108. **What Amounts to Wrongful Delivery by Carrier.** — The rule being quite universal that a wrongful delivery by a carrier of property intrusted to it for transportation constitutes a conversion, it is material to know what is such wrongful delivery as contemplated

¹ *Brower v. Peabody*, 13 N. Y. 121.

² *Bush v. St. Louis, etc. Co.*, 3 Mo. App. 62; *Decan v. Shipper*, 35 Pa. 239, 78 A. D. 334; *Weyland v. A. T. & S. F. Ry. Co.*, 75 Ia. 573, 39 N. W. 899, 9 A. S. R. 504, 1 L. R. A. 650.

³ *Douglas v. People's Bank*, 86 Ky. 176, 5 S. W. 420; *Louisville Co. v. Barkhouse*, 100 Ala. 543; 13 S. W. 534; *Weyland v. A. T. & S. F. Ry. Co.*, *supra*; see *Shaw v. Merchant's Bank*, 101 U. S. 557, 25 L. Ed. 892.

⁴ *Union Stock Yards v. Westcott*, 47 Neb. 300, 66 N. W. 419; see *North Pac. Co. v. Bank*, 123 U. S. 727, 31 L. Ed. 287; *Bank of Com. v. Bissell*, 72 N. Y. 615.

⁵ *Wilson, etc. Co. v. Louisville Co.*, 71 Mo. 203.

⁶ *Mickey v. St. Louis Co.*, 35 Mo. App. 79.

⁷ *Meyer v. Lemcke*, 31 Ind. 208; *The Argyle v. Worthington*, 17 Ohio 460; *Louisville Co. v. Hartwell*, 18 Ky. L. Rep. 745.

by the authorities. In this connection, an Arkansas case seems to stand on an unusual state of facts. The goods were shipped under a bill of lading directing delivery to the consignee absolutely without mention of his "order" or "assigns." The consignor drew a draft on the consignee, attached same to the bill of lading, and forwarded it to a bank to be presented to the consignee for payment. Such presentment was made and payment refused. In the meantime, the defendant carrier had delivered the goods to the consignee without his producing the bill of lading. The court held the carrier not liable on the ground that the bill of lading authorized delivery to the consignee absolutely and to no other person.¹ If a shipper takes a bill of lading to himself as consignee, but later consents that the carrier may deliver the goods to a third person, a subsequent assignee of the bill of lading cannot hold the carrier liable for delivering the property to such third person without a production by him of the bill of lading.² The same doctrine was applied where the consignor had sent a telegram to the consignee telling him to do the best he could and that such would be satisfactory, delivery thereupon being made by the carrier without production of the bill of lading.³ And where the consignee assigned the bill of lading after receiving the goods from the carrier who did not demand a surrender of the bill of lading, the assignee was refused recovery from the carrier as for a wrongful delivery;⁴ but in all such cases the burden is upon the carrier to show that the person to whom delivery of the goods was made had authority to receive them.⁵ It is the rule, however, that a carrier will be justified in delivering goods to the true owner or his order without production of, and even contrary to the bill of lading.⁶

§ 109. Fault of Consignor or Consignee Excuses Mis-delivery by Carrier. — The fault of the consignor or consignee is the only excuse that will relieve a carrier from liability for a mis-delivery of the goods carried by it. "No circumstances of fraud, imposition, or mistake will excuse the common carrier for responsibility for a delivery to the wrong person. The law exacts of him absolutely the certainty that the person to whom the delivery is made is the party

¹ *Neb. M. Mills v. St. Louis, etc. Co.*, 64 Ark. 169, 41 S. W. 810, 62 A. S. R. 183, 38 L. R. A. 358.

² *Ala. Nat'l Bank v. Mobile Road*, 42 Mo. App. 284.

³ *Mitchell v. Chesapeake Road*, 17 Ill. App. 231.

⁴ *Anchor Mill Co. v. Burlington Road*, 102 Ia. 262, 71 N. W. 255.

⁵ *Wilcox v. Chicago Co.*, 24 Minn. 269; *Am. Ex. Co. v. Greenhalgh*, 80 Ill. 68.

⁶ "The Idaho", 93 U. S. 575, 23 L. Ed. 978; see, in general, *Chicago Co. v. Savannah Co.*, 103 Ga. 140, 29 S. E. 698, 40 L. R. A. 367; *Boatman's Bank v. Western Co.*, 81 Ga. 221; *Penn. Road v. Stern*, 119 Pa. St. 24, 12 Atl. 756, 4 A. S. R. 626; *Hall v. Boston, etc. Co.*, 96 Mass. 439; *Ill. Cent. Ry. Co. v. Parks*, 54 Ill. 294; *Packard v. Getman*, 4 Wend. 615, 21 A. D. 166.

rightfully entitled to the goods, and puts upon him the entire risk of mistakes in this respect, no matter from what cause occasioned, however justifiable the delivery may seem to have been, or however satisfactory the circumstances or proof of identity may have been to his mind; and no excuse has ever been allowed for a delivery to a person for whom the goods were not directed or consigned. If, therefore, the person who applies for the goods is not known to the carrier, and he has any doubt as to his being the consignee, he should require the most unquestionable proof of his identity, or, if from any cause he should have a reasonable doubt as to whether the person claiming the goods was entitled to them, he should refuse delivery to him until he established his right. If, however, the delivery be made to the wrong person, whether by innocent mistake or through fraud practiced upon the carrier, such wrongful delivery will be a conversion."¹ Thus, it is seen that mistake is not an excuse for a wrongful delivery;² nor gross imposition upon the carrier,³ such as a forged or fraudulent order.⁴ So, where the goods were shipped to "R. Adams," and were subsequently delivered by the carrier to an impostor calling himself "Robert Adams," the carrier was held liable in trover.⁵ And where goods were billed to "E. Kline," but by mistake the wrong street was named, the carrier was held liable for a mis-delivery.⁶ And where the carrier knew the property belonged to the consignor, it was held liable for delivering it to a third person upon the order of the consignee.⁷

§ 110. **Mis-delivery by Carrier Induced by Fraud.**—There is an irreconcilable conflict among the authorities as to the liability of a carrier in cases where a delivery had been induced through an imposition practiced upon the shipper or where the latter has by his own acts enabled a swindler to perpetrate a fraud upon the carrier and thus obtain possession of the goods. It being a hopeless effort to attempt to deduce a rule that would bring the cases into any

¹ Hutchinson on Carriers, 344; see *Erie Dispatch v. Johnson*, 87 Tenn. 490; *Mo. etc. Co. v. Heidelheimer*, 82 Tex. 201, 17 S. W. 608, 27 A. S. R. 861; *Howard v. Old Dominion Co.*, 83 N. C. 158, 35 A. R. 571; *Elva v. American Ex. Co.*, 29 Wis. 611, 9 A. R. 619; *Southern Co. v. Crook*, 44 Ala. 468, 4 A. R. 140.

² *Little Rock Co. v. Glidwell*, 39 Ark. 487.

³ *Adams v. Blankenstein*, 2 Cal. 413, 56 A. D. 350.

⁴ *Winslow v. The Vermont Road*, 42 Vt. 700, 1 A. R. 365; *McEntee v. N. J. Co.*, 45 N. Y. 34, 6 A. R. 28; *Waldron v. Chicago Co.*, 1 Dak. 336, 46 N. W. 456; *American Co. v. Milk*, 73 Ill. 224; *Powell v. Meyers*, 26 Wend. 591; *Cavallaro v. Texas Co.*, 110 Cal. 348, 42 Pac. 918; see as apparent exceptions to the rule *Hayes v. Wells, Fargo Co.*, 23 Cal. 185, 83 A. D. 89; *Ryder v. B. C. Co.*, 51 Ia. 460, 1 N. W. 747; *Ten Eyck v. Harris*, 47 Ill. 268.

⁵ *Houston Co. v. Adams*, 49 Tex. 748, 30 A. R. 116.

⁶ *McCulloch v. McDonald*, 91 Ind. 240.

⁷ *So. Express Co. v. Dickson*, 94 U. S. 549.

semblance of harmony, I shall be content in presenting some of the holdings in support of each line of reasoning. One set of authorities declare that while the carrier is liable for frauds or impositions practiced upon it, such liability will not be imposed where the imposition was upon the shipper and unknown to the carrier. Thus, where goods were consigned to a party under an assumed name and delivered to him at the place of destination, the carrier was held not liable for a mis-delivery, even though the consignee was known to a clerk of the carrier by his right name and claimed to the clerk that he was the agent of the consignee.¹ And where goods were sent to a swindler to a town in which there was a reputable merchant of the same name, the carrier was exonerated from a delivery to the swindler even though the shipper thought he was sending the goods to the reputable merchant.² In a similar case, the court remarked: "It seems to us that the defendant, in answer to plaintiff's claim, may well say we have delivered the goods intrusted to us according to your directions, to the man to whom you sent them, and who, as we were induced to believe by your acts in dealing with him, was the man to whom you intended to send them; we are guilty of no fault or negligence."³ In fact, the cases exempting carriers from liability under such circumstances as these mentioned, declare that the degree of care used by the carrier should determine the matter, and that it is not a question whether a conversion has taken place. Thus, in a dissenting opinion in an Illinois case, one of the Judges said: "While it is true that no fraud or imposition practiced upon the carrier will relieve or excuse it from responsibility for delivery to the wrong person, yet I am not prepared to go to the extent of holding that the carrier is responsible for loss occasioned by fraud practiced upon the consignee, when the carrier itself has used due diligence, care and caution and is free from negligence. If a fraud is perpetrated upon the consignor by reason of ingenious tricks or devices, or because of a want of care on his part, the carrier does not become a party to that fraud nor does any liability accrue against it by doing the only thing the consignor intended should be done."⁴ In an Alabama

¹ *Dunbar v. Boston Co.*, 110 Mass. 26, 14 A. R. 576.

² "The Drew", 15 Fed. 826; *Wilson v. Adams Express Co.*, 27 Mo. App. 360; in this case, however, it was held that if the carrier had failed to exercise reasonable care it would have been liable, intimating that the case was one to be determined on the negligence or lack of negligence of the carrier.

³ *Samuel v. Cheney*, 135 Mass. 278, 46 A. R. 467; see *Edmunds v. Merchants Co.*, 135 Mass. 283, 16 Am. & Eng. Ry Cases, 250, in which case it was held that the carrier was justified in delivering to the real owner if such a sale had been made that title passed, but not if such sale had not been made.

⁴ *Pac. Express Co. v. Shearer*, 160 Ill. 215, 43 N. E. 816, 52 A. S. R. 325, 37 L. R. A. 177; see *Bush v. St. Louis Co.*, 3 Mo. App. 62.

case it was shown that an impostor had sent a telegram in the name of another to a third person requesting the third person to send money to him by telegram, which request was complied with under the belief that the person was the one whose name was signed to the telegram. The telegraph company delivered the money to the one who sent the original telegram without suspicion that he was not the one he represented himself to be. And in a suit against it for a mis-delivery it was held not liable.¹

§ 111. **Same Subject.** — An Illinois case founded on facts identical with those of the Alabama case above cited, except that the money was sent by express and the express company was defendant, is illustrative of a different doctrine. It was said in this case: "The law requires at the hands of the carrier absolute certainty that the person to whom the delivery is made is the real person to whom the goods have been consigned, and the carrier cannot escape liability on the ground that deception, imposition or fraud may have been resorted to by an impostor to obtain from the agent of the carrier the goods intrusted to its care. The business interests of the country, as well as the rights of a consignor who pays a liberal price for the transportation of his property, alike demand that the carrier should be held to a strict accountability."² And it is further said that it is the duty of the carrier, where the consignee is unknown to its agent, to hold the goods until the consignee furnishes ample proof that he is the person to whom the goods were consigned. Supporting this doctrine in an extreme measure, is the case of *Price v. The Oswego Company*.³ In that case the goods had been ordered under the fictitious name of S. H. Wilson & Co. They were shipped and delivered by the carrier to the person who signed the order, but the carrier required no identification. The court held that as there was in existence no such firm as S. H. Wilson & Co., no proper delivery could be made, and when the carrier surrendered the goods to a stranger it rendered itself liable to the consignor.⁴

§ 112. **Same Subject; Carrier's Right to Rely on Appearances of Ownership.** — The following quotation from Elliott on Railroads⁵ is pertinent to the discussion of these divergent views: "It is difficult to tell just what limitations or exceptions, if any, there are to the general rule requiring the carrier at all events to deliver to the

¹ *West. Union Co. v. Meyer*, 61 Ala. 158, 32 A. R. 1.

² *Pac. Express Co. v. Shearer*, *supra*.

³ 50 N. Y. 213, 10 A. R. 475.

⁴ As supporting this doctrine, see *Winslow v. Vermont Co.*, 42 Vt. 700, 1 A. R. 365; *Am. Exp. Co. v. Fletcher*, 25 Ind. 492; *Sword v. Young*, 89 Tenn. 126, 14 S. W. 481; *Brunswick v. U. S. Express Co.*, 46 Ia. 677.

⁵ Vol. 4, § 1526.

right person, but we think that if the mis-delivery is caused by misdirection or other negligence on the part of the shipper, or if fraud is perpetrated upon him by a third person in such a manner that he really parts with the title to the goods to such third person, the carrier, acting on the faith of appearances which the owner himself has created and in accordance with his directions, ought not to be held liable to him for delivering the goods to such third person, although the owner was imposed on by him."

§ 113. **Custom Regulating Delivery by Carriers.** — In suits for the wrongful delivery of goods by common carriers, the defense of a delivery in accordance with a custom has frequently been interposed. It is well settled that custom or usage may frequently have great influence in determining what is sufficient delivery. But a carrier is not relieved from liability for delivering goods without production of the bill of lading on the ground of a delivery in accordance with a course of dealing with the party to whom it is made, in the absence of proof that such course of dealing was brought to the knowledge of the consignor in a way that would justify a finding that he had acquiesced therein and consented to the delivery in the particular instance accordingly.¹ Thus a local custom to deliver goods to any person who holds the bill of lading, but which is not a general custom, does not bind a shipper who takes a bill of lading, naming himself as consignee, and delivers it to another person unindorsed — at least if the shipper had no knowledge of such custom.²

§ 114. **Payment of Freight as Condition Precedent to Action.** — A carrier has a lien upon goods transported by it for the reasonable charges for such transportation. It is, therefore, ordinarily entitled to retain possession of the goods until such charges are paid. But if the carrier has converted the goods, a different rule has been held to obtain. And it is said generally that the rule that, to entitle the consignee to the possession of the goods, he must pay or tender to the carrier the legal charges for their carriage, has no application in an action against the said carrier for a conversion of the goods.³ And where the goods had been damaged in transit and the consignee demanded it without payment of the freight, which demand was refused by the carrier, it was held that the action of trover for a conversion by such refusal would lie, if at all, without payment of

¹ Pa. Ry. Co. v. Stern, 119 Pa. St. 24, 12 Atl. 756, 4 A. S. R. 626.

² Weyland v. A. T. & S. F. Co., 75 Ia. 573, 39 N. W. 899, 9 A. S. R. 504, 1 L. R. A. 650; No. Pa. Co. v. Bank, 123 U. S. 727; Bank of Commerce v. Bissell, 72 N. Y. 615.

³ Baltimore, etc. Co. v. O'Donnell, 49 Ohio St. 489, 32 N. E. 476, 34 A. S. R. 579, 21 L. R. A. 117, 55 A. & Eng. Ry. Cases, 665; Saltus v. Everett, 20 Wend. 267, 32 A. D. 541.

freight only where the amount of the damages equalled or exceeded the freight charges.¹ And where the action has been permitted without requiring payment of freight, as a condition precedent, it has been held that the damages for the carrier's conversion of goods, by wrongfully selling them for transportation charges, should be reduced by deducting therefrom the amount of such charges.²

§ 115. **Demand by Carrier of Payment of Charges Other than Freight.** — The refusal of a common carrier to deliver goods without payment of a sum in addition to the legitimate freight, which it has no right to exact, is evidence of a conversion.³ Thus, a carrier refused to deliver property carried by it unless passage for the consignor's father, who came on the same vessel, was also paid. The court held the following: "We are of the opinion that all which it was necessary for the plaintiff to prove in order to maintain this action, was his readiness to pay freight on the goods upon their being delivered to him, and the defendant's refusal to deliver them unless something more should first be paid. . . . The jury should be instructed that if the plaintiff was ready to pay freight upon having the goods delivered to him, and the defendants, having no legal claim on the goods for anything besides the freight, refused to deliver them unless a further sum should first be paid, then the plaintiff was not bound to make any tender to the defendants, and their refusal to deliver the goods was evidence of a conversion of them."⁴ This doctrine simply is that the one entitled to the goods is not bound to tender payment if he is ready to pay but the carrier refuses to deliver without performance by the former of some condition which the carrier has no right to exact.⁵

§ 116. **Where Carrier Receives Stolen Goods for Carriage.** — There is an apparent uniformity among the decisions in holding that no payment or tender of freight charges by the rightful owner of the goods is necessary to give him a right of action against the carrier where the latter refuses to deliver them without such payment if they were delivered to the carrier by one who had stolen them or otherwise wrongfully obtained possession and who had no authority from the owner to deliver the goods to the carrier.⁶ Trover and re-

¹ *Miami Powder Co. v. Port Royal Co.*, 38 S. C. 78, 16 S. E. 339, 58 A. S. R. 880, 21 L. R. A. 123, 55 A. & Eng. Ry. Cases, 694; see *Potts v. N. Y. Road*, 131 Mass. 455, 41 A. R. 247, where part of the goods had already been delivered and the carrier refused to deliver the remainder until freight on all had been paid.

² *Briggs v. Boston Col.*, 6 Allen (Mass.) 246, 83 A. D. 626.

³ *Richardson v. Rich*, 104 Mass. 159.

⁴ *Adams v. Clark*, 9 Cush. 215, 57 A. D. 41.

⁵ *Stickney v. Allen*, 10 Gray 356; see 3 Kent's Com. 281.

⁶ *Fitch v. Newberry*, 1 Doug. (Mich.) 1, 40 A. D. 33; *Clark v. Lowell Co.*, 9 Gray 231.

plevin are concurrent remedies under such circumstances, and either may be successfully invoked by the owner. Thus, in a well-considered case in Massachusetts, it was held that a common carrier had no lien for freight on goods received from a wrong-doer without the owner's consent, express or implied, as against such owner, although they were innocently received by the carrier.¹ The rule of *caveat emptor* was held to be applicable to such case. In the same state another case arose upon the following fact: The lessee of a sewing machine employed the defendant to move the machine but failed to pay him; the defendant retained possession under the claim of having a lien upon it for his charges; the owner demanded it, which demand was refused unless the charges should first be paid; the owner brought an action of trover, and the court sustained it on the ground that the defendant's possession was wrongful and his refusal to deliver the machine a conversion.²

§ 117. **Demand for Unreasonable Freight Charges.** — The same liability falls upon the carrier if it refuses to deliver the goods without payment of an unreasonable charge for freight. Of course, where freight is demanded and paid in advance, this question cannot arise. But if not, the rule is stated to be as follows: If the price for the carriage is not demanded in advance, the owner may demand the goods after carriage, tendering what he believes to be a reasonable compensation, and upon the carrier's refusal to accept the tender and deliver the goods, he may sue it for them in trover or replevin; in which, however, he would fail if the issue as to reasonable compensation should be determined in favor of the carrier.³

§ 118. **Surrender of Goods under Legal Process.** — A carrier is by law excused for a non-delivery of property in its possession for transportation where such non-delivery is caused by the act of God, the public enemy, or the mandate of public authority. And the exemption under the last-named cause extends to those cases in which the goods have been taken from the carrier by virtue of legal process in the hands of a duly authorized officer. But in order to so excuse the carrier from liability, the seizure of the goods must have been without laches, connivance or collusion on its part. As a justification of this exemption, it is said in an Indiana case: "It is impossible for the carrier to deliver the goods to the consignee when they have been seized by legal process and taken out of his possession. The carrier cannot stop, when the goods are offered him for

¹ Robinson v. Baker, 5 Cush. 137, 51 A. D. 54 (replevin).

² Gilson v. Gwinn, 107 Mass. 126, 9 A. R. 13; see Waite v. Gilbert, 10 Cush. 177.

³ Hutchinson on Carriers, 447a (2d ed.).

carriage, to investigate the question of ownership, nor do we think he is bound when the goods are so taken out of his possession, to follow them up and be at the trouble and expense of asserting the claim thereto of the party to or for whom he undertook to carry them. We do not think it is material what the form of process may be. In every case the carrier must yield to the authority of the legal process. After seizure of the goods by the officer by virtue of the process, they are in the custody of the law and the carrier cannot comply with his contract without a resistance of the process and a violation of the law. The right of the sheriff to hold the goods involved questions which could only be determined by the tribunal which issued the process, or some other competent tribunal, and the carrier had no power to decide them. If the goods were wrongfully seized, the plaintiffs have their remedy against the officer who seized them or against the party at whose instance it was done. As between the parties, the process would be no justification if the plaintiff were the owners and entitled to the possession of the goods. The carrier is deprived of the possession of the goods by a superior power, the power of the state — the *vis major* of the civil law — and in all things as potent and overpowering, as far as the carrier is concerned, as if it were the act of God or the public enemy. In fact, it amounts to the same thing, the carrier is powerless in the grasp of either.”¹

§ 119. **Same Subject; Process Must be Fair on Its Face.** — But when goods are taken from a carrier by an officer it must appear that the process under which he acts is legal and valid on its face and authorizes the officer to take the goods. Some cases go so far as to say that if the process is void for want of jurisdiction in the court issuing it, or for any other reason, the officer attempting to act upon it becomes a mere trespasser and the carrier who is no more compelled to submit to his acts than to those of any other trespasser, becomes a wrong-doer and is thereby rendered liable for the value of the goods if it surrenders possession under the demands of the officer. Of course,² an officer attempting to seize the goods without a warrant or other process has no more authority than any other trespasser, and if the carrier surrenders the goods to him, it will be liable for their value.³ But in my opinion, the rule is too stringent

¹ Ohio, etc. Co. v. Yohe, 51 Ind. 184, 19 A. R. 727.

² Gibbons v. Farwell, 63 Mich. 345, 29 N. W. 855, 6 A. S. R. 301; citing Angell on Carriers, sec. 337a; Kiff v. Old Colony Ry. Co., 117 Mass. 591, 19 A. R. 429; Edwards v. White Line Co., 104 Mass. 159, 6 A. R. 213.

³ Bennett v. Am. Exp. Co., 83 Me. 236, 22 Atl. 159, 23 A. S. R. 774; see Savannah Co. v. Wilcox, 48 Ga. 432; Bliven v. Hudson Co., 36 N. Y. 403; Hutchinson, Carriers, art. 400.

which requires the carrier to decide the validity of the process farther than it shows upon its face. If it be regular and valid upon its face, it justifies and protects the officers in serving it, and the carrier should certainly be entitled to the same protection in yielding to a writ as an officer in serving it.¹

§ 120. **Same Subject; Where Process Invalid.**—It has been held in at least one case that trover would not lie against a carrier for surrendering goods to an officer acting under an invalid writ.² But, while different forms of remedy have been adopted in such cases,³ it is generally thought that the act of the carrier is a conversion and that, consequently, trover is a proper remedy.⁴ Especially would the wrongful act of the carrier be a conversion if the surrender of possession to an officer be through the connivance or collusion of the carrier. And all the cases hold that if the legal proceedings be had at the instance or through the fraud, connivance or collusion of the carrier, the surrender by it to an officer, even though he be armed with legal process, is no justification for a failure to deliver to the proper party. Thus, if a carrier on demand of an adverse claimant refuses to surrender possession of the goods, but promises to and does delay shipment so as to give the claimant time to institute legal proceedings and serve process, under which process the goods are seized, it will be liable for the value of the goods unless it can show that the adverse claimant is the rightful owner.⁵ But where demand of possession is made on the carrier under a chattel mortgage and after condition broken, by a constable, acting for the mortgagee but without any legal process, the carrier will be rendered liable for a refusal to surrender the goods, as the constable could act merely as the agent of the mortgagee. As the opinion states: "The goods were not seized or demanded under any legal process. The fact that the person selected as the agent of the plaintiffs to enforce their mortgage claimed to be a constable cannot affect the question, for, even where a mortgage of personal property is placed in the hands of the sheriff, with instructions from the mortgagee to seize and sell

¹ *McAlister v. Chicago Co.*, 74 Mo. 351.

² *Edwards v. White Line Co.*, 104 Mass. 159, 19 A. R. 213. In this case, however, a writ of attachment was issued against one not the owner of the goods, and the court remarked that if the attachment had been against the owner the case would have stood differently.

³ *Pingree v. Detroit Co.*, 66 Mich. 143, 33 N. W. 298, 11 A. S. R. 479; *Stiles v. Davis*, 1 Black. 101 (U. S.).

⁴ *Railway Co. v. O'Donnell*, 49 Ohio St. 489, 32 N. E. 476, 34 A. S. R. 579, 21 L. R. A. 117; *Kohn v. Richmond Co.*, 37 S. C. 1, 34 A. S. R. 726, 24 L. R. A. 100.

⁵ *Robinson v. Memphis Co.*, 16 Fed. 57.

the mortgaged property, the sheriff does not act officially, but merely as the private agent of the mortgagee.”¹

§ 121. **Same Subject; Carrier must Give Notice to Owner.**—When goods are taken from a carrier under legal process, and without laches, fault or collusion of the carrier, it is its duty to give prompt notice to the owner of the goods or the consignor, of such seizure and of the pendency of such legal proceedings; the object of such notice being to give the owner or consignor an opportunity to defend the action or otherwise assert his title and protect his rights.² If the carrier fail or neglect to give such prompt notice, it will thereby take upon itself the *onus* of showing that the party at whose instance the goods were seized had the better right to them.³ In one case the court held an answer of a carrier bad that sought to justify a non-delivery of goods by the averment that they were taken from it through legal process, but failed to allege that it gave immediate notice of such seizure to the consignors.⁴

§ 122. **Miscellaneous Instances of Conversion by Carrier.**—A cartman took goods by direction of another and carried them away under circumstances sufficient to have put him on notice that such other had no authority over the property. The cartman was held liable to the owner for a conversion of the goods.⁵ But a carrier is not guilty of a conversion where he receives the goods from one who has no right to them and acts as a mere conduit in the transportation of them, provided he is ignorant of any controversy in regard to the property and of the rights of the true owner.⁶ A false assertion by a carrier that he has delivered the goods is not a conversion,⁷ unless it can be construed as a refusal to deliver. Neither is mere delay in delivery a conversion.⁸ But where a carrier wrongfully broke open a box in its custody, it was held liable as for a conversion,⁹ also where it drew out part of the contents of a cask and filled it with water,¹⁰ and where it wrongfully sold the goods for an alleged lien for freight.¹¹ An interesting case arose upon the following facts: A

¹ *Kohn v. Richmond Co.*, 37 S. C. 1, 16 S. E. 376, 34 A. S. R. 726, 24 L. R. A. 100.

² *Jewett v. Olsen*, 18 Ore. 419, 23 Pac. 262, 17 A. S. R. 745.

³ *Robinson v. Memphis Co.*, 16 Fed. 57; *Bliven v. Hudson Co.*, 36 N. Y. 403.

⁴ *Ohio etc. Co. v. Yohe*, 51 Ind. 181, 19 A. R. 727; see *Kiff v. Old Colony Co.*, 117 Mass. 591, 19 A. R. 429; *Railway Co. v. O'Donnell*, 49 Ohio St. 489, 32 N. E. 476, 34 A. S. R. 579, 21 L. R. A. 117; *Faust v. South Car. Co.*, 8 S. C. 118.

⁵ *Thorpe v. Burling*, 11 Johns. 285.

⁶ *Gurley v. Armstead*, 148 Mass. 267, 19 N. E. 389, 2 L. R. A. 80; *Nanson v. Jacob*, 93 Mo. 331, 6 S. W. 246.

⁷ *Attersoll v. Briant*, 1 Campb. 309.

⁸ *Ryerson v. Kentfield*, 6 Hun 388.

⁹ *Tucker v. Railway*, 39 Conn. 447.

¹⁰ *Dench v. Walker*, 14 Mass. 500.

¹¹ *Briggs v. Boston, etc. Co.*, 6 Allen (Mass.) 246, 83 A. D. 626.

passenger whose ticket prohibited his carrying bundles, boarded a train with several parcels of groceries. The employees of the carrier informed him that he would either have to remove the parcels or himself get off. He refused to do either, and they forcibly took the parcels from him and placed them in the baggage car. The court held the carrier liable in trover, saying that the forcible removal of the parcels constituted a conversion.¹

8. MORTGAGOR OR MORTGAGEE

§ 123. **By Mortgagor or his Successor in Interest.** — It is said that a mortgagor in possession is a bailee for the mortgagee, who is the legal owner, with the right to take possession at any time unless he has otherwise stipulated. He is not a mere bailee, because he has an interest in the property; he has an equity of redemption. This he may sell or mortgage; but he cannot go further and sell or mortgage the entire property, and thus deal with that which belongs to another as if it were his own.² Such dealing constitutes a conversion upon the principle that the assuming the right of control and disposal of the property of another or to which such other is entitled to possession, is a conversion. And while it is not true that in all states the mortgagee is the legal owner of the property, yet in those jurisdictions where legal title to mortgaged property reposes in the mortgagor, the mortgagee has an interest in the same so that circumstances may arise by virtue of which the mortgagor as against the mortgagee may be guilty of having converted the mortgaged property. This is especially true where by some breach of condition or other circumstance the mortgagee has become entitled to possession of the property. Thus, where a chattel mortgage provided that, on default in payment of the debt secured, the mortgagee might take possession of the property, refusal to deliver possession on a demand made after default in payment was held to be a conversion.³ The demand in this case was made upon the executor of the estate of the mortgagor, who refused to surrender possession. In its opinion, the court says relative to the interest of the mortgagee which would entitle him to maintain trover for the conversion: "The possession of the property and its delivery on the sale to satisfy the debt, would naturally tend to increase the price that it might bring, and the inability to deliver would naturally decrease the price; and thus the

¹ *Bullock v. Delaware, etc. Co.*, 60 N. J. 24, 30 Atl. 773, 37 L. R. A. 417.

² *Jones, Chattel Mortgages*, 462, citing *Millar v. Allen*, 10 R. I. 49.

³ *Mathew v. Mathew*, 138 Cal. 334, 71 Pac. 344.

want of possession in the mortgagee would depreciate the value of the mortgage security and greatly impair his interest in the property. The legal title is not always necessary to an action for conversion, but any special valuable interest in the property, accompanied with the right of possession, is a sufficient title upon which to base the right of such an action. We quote the language of the Supreme Court of Wisconsin in a case similar to this: 'His right to recover against any persons unlawfully converting the same in hostility to his rights as mortgagee was just as perfect as if he had been the absolute owner thereof; the only difference being that, as against persons claiming under the mortgagor or his assigns, his right to damages would be limited to the amount due upon his mortgage, and not the value of the property, if such value exceeded the amount so due.'"¹

§ 124. **Use by Mortgagor no Conversion, When.** — The use, control and possession of mortgaged personalty by a mortgagor cannot be a conversion of same as against a mortgagee as long as such use and control are clearly within the limits of the interest still retained by the mortgagor; but for any use or disposition beyond that, the mortgagee may maintain trover; thus, where the mortgagor executed a second mortgage upon the chattel and upon the entire property in same, gave no notice of the prior mortgage, and later surrendered possession of the property to the junior mortgagee or permitted him to take such possession, he was held liable in trover to the senior mortgagee for a conversion of the property.² So, an absolute sale of the entire property without regard to the interests of the mortgagee is a conversion,³ and the same is true of any other disposal of the property, such as removing same from the reach of the mortgagee, secreting the same, or so handling it that it cannot be made accessible for the enforcement of the rights of the mortgagee.

§ 125. **Trover against Those Claiming Under Mortgagor.** — And circumstances available for maintaining trover against a mortgagor may also be made use of under the proper conditions to fasten liability upon those claiming under him. Thus, a mortgage on growing crops provided that if default should be made in payment or any attempt to remove or dispose of the property, it should be lawful for the mortgagees to take possession thereof wherever it might be found. Therefore, after condition broken, the mortgagees were not

¹ *Smith v. Koust*, 50 Wis. 360, 7 N. W. 293; see *Alferitz v. Borgwaldt*, 126 Cal. 202, 58 Pac. 460; *Bank v. Moore*, 106 Cal. 673, 39 Pac. 1071.

² *Millar v. Allen*, 10 R. I. 49.

³ *Whitney v. Lowell*, 33 Me. 318; *Coles v. Clark*, 3 Cush. 399; *Lowe v. Wing*, 56 Wis. 31, 13 N. W. 892.

only vested with the title but also with the right of immediate possession. But the mortgagor, after harvesting the crop, sold the grain to the third persons without giving notice of the mortgage. In an action by the mortgagees against the purchaser, the court held him liable for a conversion of the grain, when he refused to surrender it upon demand of the mortgagees.¹ And where a mortgagor secretly sent the mortgaged property to an auctioneer with instructions to sell same, the auctioneer was held liable to the mortgagee for the proceeds of the sale, although he had no knowledge of the mortgage and was guiltless of any intention to defraud the mortgagee.² Of course, in such a case, the mortgagee could have sued the mortgagor in trover under the same facts. An officer took possession of a horse under a chattel mortgage; the mortgagor replevied it; later he sold it; the mortgagee was given judgment against the purchaser for the value of the horse.³ A sheriff levied an execution upon mortgaged personalty and assumed to sell the entire interest in the property in disregard of the mortgage and over the objection of the mortgagee. The court held such a sale a conversion, as only the interest of the mortgagor should have been sold, even though the purchaser had knowledge of the mortgage.⁴ And the same holding was announced in a case where a sheriff sold the entire interest in mortgaged property without tendering to the mortgagee or depositing with the county treasurer the amount of the mortgage-debt and interest as the statute directed.⁵

§ 126. Same Subject; Where Interest of Mortgagor Levied Upon. — Mr. Cobbey says concerning the subject under consideration: There is no doubt that after condition broken in a mortgage of personal property, the title of such property becomes invested in the mortgagee, subject, it is true, to an accounting in equity to the mortgagor for the surplus, if any, over the debt intended to be secured, but as to all others, and in fact, as to the mortgagors, the title of the mortgagee is absolute and complete. Where property covered by a mortgage duly recorded, the condition of which has been broken by default in payment, while in the mortgagor's possession, is levied on and sold under an execution on a judgment recovered against the mortgagor, both execution creditors and the officer making the levy and sale are liable to a personal action by the mortgagee for damages

¹ *Close v. Hodges*, 44 Minn. 204, 46 N. W. 335.

² *Coles v. Clark*, 3 Cush. 399.

³ *Warner v. Comstock*, 55 Mich. 615, 22 N. W. 64.

⁴ *Appleton Mill Co. v. Warder*, 42 Minn. 117, 43 N. W. 791.

⁵ *Keith v. Haggart*, 4 Dak. 438, 33 N. W. 465.

for conversion and sale of the property.¹ The American law is unsettled as to whether a mortgagor has such an interest in his mortgaged chattels, as may be levied upon. Some states have provided by statute the conditions upon which such a levy may be made. In other jurisdictions it is held by the courts that the interest of the mortgagor cannot be seized. Still other courts say that the interest of the mortgagor, if it extend to the right of possession of the property, may be taken. But whenever the right is given to seize the mortgaged property by a levy on the interest of the mortgagor therein, the acts of the officer must be so circumscribed as that the interests of the mortgagee shall not be endangered. And, after condition broken, as by default in payment, or some other contingency by which the right of possession passes from the mortgagor to the mortgagee, there is no interest left to the mortgagor which may be taken by levy.² So, if an officer, after such breach of condition and the acquisition of the right of possession by the mortgagee, interferes, by a levy or otherwise, with the property in behalf of creditors of the mortgagor, he will be liable to an action of trover for its conversion, or, at the option of the mortgagee, to replevin for its recovery.³ And if the right of the mortgagee to possession matures after the seizure of the mortgaged property by an officer under a writ in favor of a creditor of the mortgagor, the officer will be liable to the mortgagee in trover or replevin if he refuse to surrender possession upon a proper demand therefor.⁴

§ 127. *Same Subject.* — By whatever mode or to whatever extent an officer when levying an execution or in any supplementary proceeding thereunder denies or violates the right of the mortgagee, the latter may seek and obtain redress by any appropriate action whether the wrong consists in levying upon the property when not subject to levy, or in retaining it after the mortgagee becomes entitled to its possession because of the default of the mortgagor, or in utterly denying the right of the mortgagee, for, though by the

¹ Vol. 2, Cobbe, Chat. Mortg., 733, citing among others: *Williams v. Dobson*, 26 S. C. 110, 1 S. E. 421; *Reese v. Lion*, 20 S. C. 17. See *Sheehan v. Levy*, 1 Wash. St. 149, 23 Pac. 802; *Bratton v. Langert*, 1 Wash. St. 227, 23 Pac. 803; *Knapp v. Gregory*, 20 N. Y. Supp. 21; *Ganong v. Green*, 71 Mich. 1, 38 N. W. 661; *Lauder v. Propper*, 6 Dak. 64, 50 N. W. 400.

² *Stuart v. Alexander*, 14 Neb. 37, 14 N. W. 655; *Yeldell v. Barnes*, 15 Mo. 443; *Paul v. Hayford*, 22 Me. 234; *Palmer v. Forbes*, 23 Ill. 301; *Campbell v. Leonard*, 11 Ia. 489.

³ *Manchester v. Tibbetts*, 121 N. Y. 219, 24 N. E. 304, 18 A. S. R. 816; *Metzler v. James*, 12 Col. 322; *Norris v. Sowles*, 57 Vt. 360; *Pollock v. Douglas*, 56 Mo. App. 487; *Heflin v. Slay*, 78 Ala. 180; *Ament v. Greer*, 37 Kan. 648, 16 Pac. 102; *Blanvelt v. Fechtman*, 48 N. J. L. 430, 8 Atl. 728; *Simmons v. Jenkins*, 76 Ill. 479; *Butler v. Lee*, 54 Miss. 476.

⁴ *Rankine v. Greer*, 38 Kan. 343, 16 Pac. 680, 5 A. S. R. 751.

statutes of the state, an officer has the right to levy upon the property subject to the mortgagee's lien, and to take possession of it for the purpose of making a sale under execution subordinate to such lien, yet, if it is clear that he made a levy in defiance of the mortgagee's claim, and intended to deny and resist altogether on the ground that the mortgage was fraudulent, or, for some other reason void, the mortgagee may at once maintain an action of replevin or trover without making any demand for the return or surrender to him of the property.¹

§ 128. **Conversion of Mortgaged Chattels by Third Persons.** — Even where the mortgagor retains possession by virtue of a stipulation in the mortgage to that effect and to the effect that the mortgagor may sell the property and apply the proceeds to the payment of the secured debt, the mortgagee may sue one attaching the property for a conversion, as in such an event it is said the possession of the mortgagor is that of the mortgagee.² The conversion of the property by a third person puts an end to an understanding between the mortgagee and mortgagor that the latter should retain possession.³ And the stipulation for the mortgagor to remain in possession is violated by his mis-use of same to its material depreciation and the mortgagee may sue in trover for its value even before default in payment of the debt.⁴ But in an action of trover by the mortgagee the mortgagor may show as a defense that the secured debt has been paid,⁵ or that there has been a parol release of the mortgage.⁶ One who buys mortgaged property and either sells it again or consumes it is liable to the mortgagee in trover for its value with interest from the time he sold or consumed it.⁷ But there must be a demand made upon the purchaser for possession and his refusal to surrender it before there is any conversion.⁸ A junior mortgagee is liable in trover to the senior mortgagee if he take the property from the latter and sell it without regard to his rights.⁹ But such action will not lie in behalf of a senior mortgagee if he has consented to the sale, as

¹ 1 Freeman, Executions, 117, citing: *Worthington v. Hanna*, 23 Mich. 530; *Cotton v. Watkins*, 6 Wis. 629; *Frisbie v. Langworthy*, 11 Wis. 375; *Merrill v. Denton*, 73 Mich. 628, 41 N. W. 823; *Malachiski v. Stellwagen*, 85 Mich. 41, 48 N. W. 152; *Williams v. Raper*, 67 Mich. 427, 34 N. W. 890.

² *Moore v. Murdock*, 26 Cal. 514; *Volney v. Gilman*, 43 Miss. 456; *Melody v. Chandler*, 12 Me. 282; *Simmons v. Jenkins*, 76 Ill. 479.

³ *Harvey v. McAdams*, 32 Mich. 472.

⁴ *Ripley v. Dolbier*, 18 Me. 382.

⁵ *Davis v. Hubbard*, 38 Ala. 185; *Ballamy v. Doud*, 11 Ia. 285.

⁶ *Acker v. Bender*, 33 Ala. 230.

⁷ *Barry v. Bennett*, 7 Metc. (Mass.) 354; *Beers v. Waterbury*, 8 Bosw. 396 (N. Y.).

⁸ *Ware v. Georgetown Soc.*, 125 Mass. 584.

⁹ *Lowe v. Wing*, 56 Wis. 31, 13 N. W. 892.

such consent is a waiver of the conversion.¹ Where there is no statutory lien in favor of a landlord on the crops of his tenant, the former is liable in trover to a mortgagee of such crops if he takes possession of same and makes application thereof to payment of rent.² The right of action for a previous conversion does not pass to the assignee of a mortgage,³ while the right to sue for a conversion subsequent to the assignment rests solely in the assignee.⁴

§ 129. **By Mortgagee or His Successor in Interest.** — If by the terms of the mortgage, a mortgagor is entitled to remain in possession until the occurring of a default or the happening of some contingency, this is a right which the mortgagee must respect, so, if a mortgagee interfere and take possession before he has the right to it, he will be liable in trover or trespass to the mortgagor.⁵ But after a breach of some condition of the mortgage by the mortgagor, the mortgagee is entitled to possession and if he proceed legally to reduce the property to his possession, the mortgagor cannot maintain trover against him for its conversion.⁶ This is a logical deduction from the fact that in order to maintain trover a party must have title to the property, either general or special, and the mortgagor after default having none is deprived of this form of action. And it is even held, pursuant to this theory, that a mortgagor cannot maintain trover against a mortgagee who sells the entire property without a legal foreclosure if he has rightfully obtained possession of the property.⁷ There is some question, however, of the propriety of this holding and it has been said that a sale by the mortgagee of the mortgaged property prior to the foreclosure is a conversion for which he is liable to the mortgagor.⁸ At any rate the relation of the mortgagee to the mortgagor is such as to impose upon him the utmost fairness and good faith. And an unfair or fraudulent sale by the mortgagee will not defeat or extinguish the rights of the mortgagor, as the mortgagee has no right by an unfair sale to sacrifice the property and deprive the mortgagor of any surplus over the debt which might arise from a sale fairly and honestly conducted.⁹ These statements apply to a sale made under a power contained in the mortgage; of course

¹ *Anderson v. Case*, 28 Wis. 505.

² *Robinson v. Kruse*, 29 Ark. 575; *Jarchow v. Pickens*, 51 Ia. 381, 1 N. W. 598.

³ *Harne v. Briggs*, 98 Mass. 510; *Langdon v. Buel*, 9 Wend. 80.

⁴ *Bowers v. Bodley*, 4 Bradw. 279 (Ill.).

⁵ *Ford v. Ransom*, 39 How. Pr. 429; *Pierce v. Housbrouck*, 49 Ill. 23; *Jackson v. Hall*, 84 N. C. 489; *Saxton v. Williams*, 15 Wis. 292.

⁶ *Heyland v. Badger*, 35 Cal. 404.

⁷ *Landon v. Emmons*, 97 Mass. 37.

⁸ *Spaulding v. Barnes*, 4 Gray 330; *Mathews v. Fisk*, 64 Me. 101.

⁹ *Wygall v. Bigelow*, 42 Kan. 447, 22 Pac. 612, 16 A. S. R. 495.

a sale made through order of court is subject to the control and confirmation of the court whose duty it is to scrutinize same and either approve or disapprove same. The sale of mortgaged property is for the purpose of extinguishing the mortgagor's equity, and where the sale is fairly made, at public auction, in pursuance of the power, the mortgagor's equity of redemption is effectually cut off, even though the mortgagee be the purchaser. A mortgagee of personal property is not within the rule which prohibits the trustee from purchasing at his own sale, provided he acts fairly. The most that could be held in case the mortgagee becomes the purchaser at his own sale, made under a power, would be to cast upon him the burden of showing that the sale was fairly and openly made, in strict compliance with the power, and that the price paid was not so clearly and grossly disproportionate to the value of the property as to raise a presumption of fraud or bad faith. If it appears that the price paid was grossly inadequate or that the property was sacrificed, the sale ought to be set aside, at the election of the mortgagor; and if it were shown that the mortgagee had converted the property after a merely colorable sale, or refused to acknowledge the mortgagor's right to redeem, he should be held to account for its fair value at the time of the appropriation.¹ A mortgagee cannot purchase at a sale under a power in the mortgage unless given that right by the mortgage or by a statute. If the mortgagee, however, does so purchase and converts the property to his own use, he will be liable in trover to the mortgagor for the actual value of the property at the time of sale.² He must not sell more than enough property to pay the secured debt. When enough has been sold to pay such debt, the mortgage becomes thereby *ipso facto* extinguished, and if the mortgagee continue the sale and dispose of the residue of the property he will be guilty of a conversion and trover may be maintained against him by the mortgagor.³ In a New York case a mortgagee had elected to sell under a power in the mortgage rather than through process of court. He sold one horse after he had already realized enough to satisfy the secured debt. The mortgagor brought trover for the value of the horse. The appellate court makes these observations: "Before he (the mortgagee) sold the horse, which alone

¹ Lee v. Fox, 113 Ind. 98, 14 N. E. 889.

² Webber v. Smerson, 3 Col. 249; Beard v. Westerman, 32 Ohio St. 29; Cushing v. Seymour Co., 30 Minn. 301, 15 N. W. 249; Korn v. Shaffer, 27 Md. 83; Phares v. Barbour, 49 Ill. 370; Alger v. Farley, 19 Ia. 518.

³ Botsford v. Murphy, 47 Mich. 537, 11 N. W. 375; Stromberg v. Lindberg, 25 Minn. 513; Griswold v. Morse, 59 N. H. 211; Bearss v. Preston, 66 Mich. 11, 32 N. W. 912; Beckley v. Munson, 22 Conn. 299.

is now in question, enough money had been raised to satisfy the amount due and unpaid, with interest and expenses. The end and object of the mortgage had thus been fully attained, and the mortgagee had no longer any right to the property which remained unsold, or to sell it under the mortgage. He certainly was not bound to proceed and sell under this power, but might have retained all the property mortgaged as his own, leaving the mortgagor to enforce his right of redemption as best he could. But the mortgagee chose not to stand on that right; he elected to raise the amount of the debt due to him by a sale under the power. This he had a right to do; but when his debt was thus paid, all right to the residue of the property was necessarily extinguished, and the power to sell became *ipso facto* void.”¹ The court, therefore, held the mortgagee liable for a conversion. “Where the mortgagee forecloses under a power of sale in the mortgage, he stands, with respect to the mortgagor’s rights in the property, in the position of a trustee, and is held to the exercise of good faith and proper care and diligence to avoid any sacrifice of these rights, not necessary to the reasonable enforcement of his own. Although the mortgage covers much more property than is necessary to his security, he may, under his mortgage, for his security, take possession of the whole; but where, without prejudice or great inconvenience to himself, he can satisfy his debt by a sale of a part, he is, if the interests of the mortgagor so require it, bound to so sell. If he unnecessarily sell the whole and especially if he do so not in good faith to satisfy his debt, but, as the court below in this case has found, in order to secure by use of the power of sale, some further advantage to effect some purpose not contemplated by the mortgage, he ought to be, and is liable to the mortgagor for the damages sustained by him through such an oppressive use of the power of sale. The claim of the mortgagor in such a case is not a debt which is the subject of levy.”²

§ 130. **Conversion by Irregular Foreclosure of Mortgage.**—A mortgagee of chattels must comply substantially with the requirements of a statute including notice of sale, in foreclosing his mortgage, and if he fails to do so, and the property is sold for less than its value, the mortgagor is entitled to have the value of the property applied to the extinguishment of the debt and if such value is greater than the mortgage debt, the mortgagee is liable to the mortgagor for the difference.³ The provisions of the statute relating to foreclosure

¹ *Charter v. Stevens*, 3 Denio 33, 45 A. D. 444.

² *Stromberg v. Lindberg*, 25 Minn. 513.

³ *Coad v. Home Cattle Co.*, 32 Neb. 761, 49 N. W. 757, 29 A. S. R. 465.

of chattel mortgages are mandatory and must be followed unless waived by the mortgagor. If the mortgagee can disregard the directions of the statute by omitting to give notice of the postponement of a sale for one week, he can, with equal propriety, omit all notice of sale. The mortgagor has an equity of redemption in the mortgaged chattels, and to extinguish the same the mortgagee must comply substantially with the requirements of the statute.¹

9. CORPORATIONS

§ 131. **General Rules Relating to Corporations.**—The rule is well settled that, while keeping within the apparent scope of corporate powers, corporations have a general capacity to render themselves liable for torts, except for those where the tort consists in the breach of some duty which from its nature could not be imposed upon or discharged by a corporation. The rule of liability embraces not only the negligences and omissions of its officers and agents who are put in charge of or employed in the corporate business, but also all tortious acts which have been authorized by the corporation, or which are done in pursuance of any general or special authority to act in its behalf on the subject to which they relate, or which the corporation has subsequently ratified.² A corporation profits by the rightful act of its agent performed within the legitimate scope of corporate business; and while the agent keeps within the limits of his authority there is a legal unity between the corporation and the agent as much when his acts are wrongful and tortious as when they are rightful, so that for such wrongful or tortious acts the corporation is responsible. The doctrine which was formerly sometimes asserted that an action would not lie against a corporation for a tort is exploded. The same rule in that respect now applies to corporations as to individuals. They are equally responsible for injuries done in the course of their business by their servants.³ And generally it has been said that a corporation is liable for the consequences of tortious acts done by its authority, though not within the scope of its powers, express, implied, or incidental.⁴ In such case the doctrine of *ultra vires* does not apply.⁵ And in line with the foregoing principles, a

¹ Coad v. Home Cattle Co., 32 Neb. 761, 49 N. W. 757, 29 A. S. R. 465; see Aylesbury Mer. Co. v. Fitch, 22 Okla. 475; 99 Pac. 1089; 23 L. R. A. (N. S.) 573.

² Cooley, Torts, 137.

³ Baltimore Ry. Co. v. Church, 108 U. S. 330.

⁴ Cent. Railway Co. v. Smith, 76 Ala. 572; Alexander v. Relfe, 74 Mo. 495; N. Y. etc. Ry. Co. v. Haring, 47 N. J. L. 137.

⁵ National Bank v. Graham, 100 U. S. 699.

corporation is liable in trover for an act of conversion committed by its agents or officers.¹

§ 132. **Transfer to Wrongful Holder of Shares.**—Stock certificates issued by a corporation are continuing representations by it that the person named in such certificate is the owner of and has complete title to the designated number of shares in such corporation. They are the outstanding paper evidence of such title. The corporation is ordinarily justified in treating the assignee or holder thereof as the legal and equitable owner. When a transfer is made upon the books of the corporation, the original certificate should be surrendered and cancelled; and the law holds the corporation to accountability for a transfer made without the production and surrender of such certificate. As said by a United States court in a case involving a national bank: “The power to transfer their stock is one of the most valuable franchises conferred by Congress upon banking associations. Without this power, it can readily be seen, the value of the stock would be greatly lessened, and obviously whatever contributes to make the shares of stock a safe mode of investment, and easily convertible, tends to enhance their value. It is no less to the interest of the shareholder than the public that the certificate representing his stock should be in form to secure public confidence; for without this he could not negotiate it to any advantage. It is in obedience to this requirement that stock certificates of all kinds have been constructed in a way to invite the confidence of business men, so that they become the basis of commercial transactions in all the large cities of the country, and are sold in open market the same as other securities. Although neither in form nor character negotiable paper, they approximate to it as nearly as practicable. If we assume that the certificates in question are not different from those in general use by corporations (and the assumption is a safe one), it is easy to see why instruments of this character are sought after and relied upon. No better form could be adopted to assure the purchaser that he can buy with safety. He is told, under the seal of the corporation, that the shareholder is entitled to so much stock, which can be transferred on the books of the corporation in person or by attorney, when the certificates are surrendered, but not otherwise. This is a notification to all persons interested to know that whoever in good faith buys the stock and produces to the corporations the certificates, regularly assigned, with power to transfer, is entitled to have the stock transferred to him. And the notification goes further, for it

¹ *State v. Norris, etc. Railway Co.*, 23 N. J. L. 360.

assures the holder that the corporation will not transfer the stock to any one not in possession of the certificates.”¹

§ 133. **Corporation Must Demand Surrender of Certificate.** — So, where certificates are outstanding representing shares of stock, it is the legal duty of the corporation to refuse to transfer such shares on its books without the production of the certificates; and any act done, or suffered to be done by it which confers title to the shares upon one without possession and who does not surrender the certificate, renders the corporation liable to the true owner for the conversion of his stock.² It is accordingly held that where stock is transferable on the books of a corporation by attorney or in person only when the certificates are surrendered, and where a stockholder is permitted to transfer his stock without surrendering his certificate, the corporation is liable in trover for the value of the stock to a *bona fide* purchaser who has produced the certificates and offered to surrender them.³ Conversely, an equitable owner of shares who demands a transfer to him on the books of the corporation without production and surrender of the certificates evidencing the shares, cannot maintain an action for the value of the shares against the corporation for its refusal to make the transfer.⁴

§ 134. **Corporation is Trustee for Stockholders.** — These principles have been adjudged upon a consideration of the relation which a corporation sustains toward its stockholders. This relation is in its nature fiduciary and partakes of the essentials of a trusteeship. And when the stock of a corporation is made transferable only on its books, the company is made the custodian of the shares, and is clothed with power to protect the rights of its stockholders from unauthorized transfers. With this power there exists the power that rests upon all trustees: To protect so far as the exercise of proper diligence and care can do so the interests of the *cestui que trust*: and it must respond in damages for an injury sustained in consequence of its negligence or misconduct.⁵ “A purchaser of stock does not receive the certificate of his vendor, but a new one made out in his own name, and reciting nothing contained in the former. He is, therefore, protected in the enjoyment of his purchase even though there was no right to make the transfer to him. For this reason, an unauthorized transfer is a wrong done to the owner of stock, for which

¹ *Lanier v. Bank*, 11 Wall. 369.

² *Cushman v. Thayer Co.*, 76 N. Y. 365, 32 A. R. 315; *Strange v. Houston Railway Co.*, 53 Tex. 162.

³ *Bank v. Lanier*, *supra*; in this case it was held to be immaterial that the bank had no notice of a transfer of the certificate.

⁴ *National Bank v. Lake Shore Ry. Co.*, 21 Ohio St. 221.

⁵ *Caulkins v. Gas & Light Co.*, 85 Tenn. 683, 4 S. W. 287, 4 A. S. R. 786.

not only the person who makes it but any one knowingly assisting in the wrong is responsible. That a bank or other corporation, and also these defendants are trustees to a certain extent for stockholders — that is, for the protection of individual interests — cannot be denied. They are alike trustees of the property and of the title of each owner. They have in their keeping the primary evidence of title, and they are justly held to proper diligence and care in its preservation. From this it results that they might rightfully demand evidence of authority to make a transfer before they permit it to be done. Their own safety requires that they be satisfied of the right of the person proposing to make a transfer to do what he proposes. Generally, sufficient evidence of such right is found in the possession of legal title to such stock. Yet it is well settled that it is not in all cases sufficient, notwithstanding that the true equitable ownership may be in some other than the holder of the legal right, and the transfer may be a gross wrong to such equitable owner. To that wrong the corporation or keepers of the register make themselves parties, if, with knowledge that there is no equitable right to transfer, they permit it to be done.”¹ Thus, it is seen that the unauthorized transfer of the stock of a corporation is a wrong done to the owner of such stock for which not only the person who makes it, but any one knowingly assisting in the wrong is responsible;² the two become thereby joint tort-feasors and equally liable. In general, if a person gets possession of certificates of shares of another, under circumstances which do not constitute him the owner, or put him under the protection of the rule relating to *bona fide* purchasers for value, the corporation will be liable to the real owner in an action for damages for the conversion of its shares, if its officers transfer the shares on the corporate books to the supposed owner. The governing principle is that the owner of property cannot be deprived of it without his consent, except by due process of law.³ And it is immaterial how the supposed owner came to possess the certificate. Thus, the officers of a corporation had been deceived by a forged power of attorney and by reason of same had permitted shares of stock to be transferred on the corporation’s books without authority from the shareholder. The corporation was held to either replace the shares or pay their value.⁴ The rule holding a corporation liable in such

¹ Bayard v. Bank, 52 Pa. St. 232.

² Taft v. Presidio Ry. Co., 84 Cal. 131, 24 Pac. 436, 18 A. S. R. 167, 11 L. R. A. 125; citing Bayard v. Bank, *supra*; 2 Thompson, Corporations, 2448.

³ 2 Thompson, Corporations, 2489, citing Tel. Co. v. Davenport, 97 U. S. 369.

⁴ Pollock v. Bank, 7 N. Y. 274, 57 A. D. 520; see Cushman v. Thayer Co., 76 N. Y. 369; Stewart v. Fireman’s Co., 53 Md. 579; Angell & Ames, Corporations, 583.

a case is analogous to the liability of a bank for misjudging the genuineness of a signature to a check which it pays. The corporation may require the fullest evidence of the validity of the power of attorney before making a transfer and it may refuse altogether until it is fully satisfied.¹ A general power of attorney authorizing an agent to sell, dispose of, transfer and deliver all or any of the interests of the principal in the capital stock of any association or body corporate, does not confer upon the agent power to transfer to himself the shares of his principal in the corporation; or to transfer such shares except by an indorsement upon the certificate in the usual way for and in the name of the principal; and where the corporation, on surrender of the share certificate by the agent, without any indorsement thereon, but upon the mere exhibition of this general power of attorney, issued to him in exchange therefor new certificates for an equal number of the shares of the corporation, it became liable to his principal for damages for the conversion of the shares. Nor could the corporation invoke the principle that where one of two innocent persons must suffer, the loss should fall upon him who has afforded opportunity for the commission of a wrong, because it was the corporation that afforded the agent the opportunity to inflict the wrong upon his principal and which aided him in so doing.²

§ 135. **Mistake in Transferring Stock.** — As stated above, a corporation transferring shares of its stock on a power of attorney purporting to be signed by the shareholder becomes an insurer, in a way, of the validity of the power and of its due execution. For any mistake made by it in this behalf, the corporation is liable; and its liability to the original shareholder is for the conversion of his shares. Therefore, if the corporation issue a new certificate to one presenting a forged power of attorney, its liability at once becomes fixed in favor of the shareholder for the value of his shares. Likewise, if a corporation transfers shares on a forged indorsement of the certificate it thereby renders itself liable in trover for the conversion of the shares under the rule that a person will not be suffered to lose his property through the crime of another.³

§ 136. **Corporation Refusing to Enter Name of Holder of Shares.** — A transferee of shares in a corporation, where the transfer has been made in compliance with the by-laws of the corporation, has a right to have his name entered on the books of the corporation as

¹ See *Chew v. Bank*, 14 Md. 299.

² 2 Thompson, *Corporations*, 2505, citing *Tafft v. Presidio Ry. Co.*, 84 Cal. 131, 24 Pac. 436, 18 A. S. R. 166, 11 L. R. A. 125.

³ *Pratt v. Boston Railway Co.*, 126 Mass. 443; *Tel. Co. v. Davenport*, 97 U. S. 369.

a shareholder, upon production by him of the certificate duly indorsed, or other proper evidence showing him to be, in fact, a *bona fide* transferee of the stock. And if, upon such a proper application by him for the register of his name as a shareholder he is refused by its officers the corporation will be held liable to him for the conversion of his shares. In regard to this rule, the following observations have been made: "In the absence of any requirements in the charter or by-laws restricting the transfer, the company must make a transfer on its books or it will be liable to the purchaser. There is no presumption in favor of the right of a corporation to refuse to transfer on its books stock of the company which a shareholder has sold to a *bona fide* purchaser. The certificate represents the property, and if any secret lien upon the property exists, such lien must be shown. The burden is on him who asserts the peculiar privilege to prove it, as restrictions on the free transfer of personal property are not favored, especially as against an innocent purchaser who has paid for the certificate. At common law, and independently of positive provisions of the legislature granting or authorizing the exercise of the power, a corporation cannot prohibit the transfer of its shares on account of the indebtedness of a shareholder to the corporation. Where the stock is personal property, the restrictions upon its transfer must have their source in legislative action, and the corporation itself cannot create these impediments."¹

§ 137. **Third Person Causing Wrongful Refusal to Transfer Stock.**—In a case involving the liability of a person for causing a corporation to refuse to register the name of an assignee of such person as a shareholder in the corporation, it appeared that the assignor of the certificate in order to cause the corporation to refuse to register the name of the assignee, presented to the corporation an affidavit that he had lost the certificate; the corporation thereupon issued and delivered to him a new certificate upon his executing a bond to save the corporation harmless from any damage by reason of the issuance of the new certificate. The assignee sued his assignor and the corporation for such a refusal to register him as a shareholder, and procured a judgment against the corporation, the court dismissing the action against the assignor. Later, the assignee sued the assignor and attempted to have himself subrogated to the rights of the corporation in respect of the bond of indemnity referred to. The appellate court held the former action against the assignor (while erroneous on the part of the trial court in dismissing the assignor) a bar to a

¹ Carroll v. Bank, 8 Mo. App. 249; see Bullard v. Bank, 18 Wall. 598; Steamship Co. v. Heron, 52 Pa. St. 280; Rosenback v. Bank, 53 Barb. 495.

recovery against him. But concerning the original liability of the assignor together with the corporation, the court said: "The rule of law is well stated that all who direct, advise or request an act to be done, which is wrongful, are themselves wrong-doers and responsible for all damages. It is stated perhaps with more accuracy that all who bid, command, advise or countenance the commission of a tort by another, or who approve of it after it is done, if done for their benefit, are liable in the same manner as they would be if they had done the same act with their own hands. Every unlawful interference with, or assertion of control over the property of another, is sufficient to subject a party to an action. . . . It is impossible to distinguish between these cases and the one at bar. The refusal of the company to make the transfer resulted naturally and ordinarily from the giving of the bond of indemnity. The plaintiff alleges and proves this to have been so. Not only that, but he also alleges, and as I think proves that Ludington (the defendant) requested the company not to transfer the stock. He did the same thing in the former action, but the judge, though he found the facts, decided as a matter of law that there could be no recovery. That decision was no doubt erroneous yet binding in all collateral proceedings." ¹

§ 138. **Where Corporation has Lien Against Stock.** — A corporation may have a lien upon its outstanding stock for debts due to it from a shareholder. This lien may be by virtue of its charter or a by-law, or may be created by general law. Where the lien exists by statutory provision, it is good against all the world and every purchaser, pledgee, or other transferee of stock takes it with notice of the lien and of all limitations and burdens connected therewith. Likewise, if the corporation is one formed under a special charter, an assignee of its shares is held to notice of its right to such a lien. And the same liability is imposed upon one who takes an assignment of a certificate upon which is printed a by-law reciting the right of the corporation to a lien for an indebtedness due it from the shareholder to whom the certificate was originally issued, for such assignee does not occupy the position of an innocent purchaser.² Ordinarily to make binding a recitation in a certificate of a lien in favor of a corporation for any indebtedness due it from a shareholder, it must be based upon a by-law of the company. But in a class of cases an equitable lien has been held to have arisen from the reservation in the certificate unauthorized by the by-laws. This right to a lien is held to be an implied agreement resulting from an acceptance by the

¹ *Greenleaf v. Ludington*, 15 Wis. 558, 82 A. D. 698.

² *State Saving Assoc. v. Printing Co.*, 25 Mo. App. 642.

shareholder. Thus, where, without objection, a shareholder accepted a certificate declaring the stock to be transferable only at the office of the company on the surrender of the certificate, "subject, nevertheless, to his indebtedness and liabilities," he was held to an agreement to a lien in favor of the corporation for the indebtedness he owed it.¹ In this case the court remarked: "To consider it otherwise than as an agreement would be to disregard the plain intention of the parties, which courts will always, if possible, carry into effect, and to sanction the perpetuation of a fraud on the defendants. Smith having received the certificate proffered to him by the defendants with that restriction, neither he nor his assignee should be permitted to deny his assent to it, and that would be sufficient to constitute an agreement." The action was one for damages brought against the bank for its refusal to transfer the stock to the assignee until the indebtedness of the shareholder was paid; and the court absolved the bank from liability.

§ 139. **When May Refuse to Transfer Stock.** — As above stated, a transferee of shares of stock in a corporation is bound to take notice of the right of the company to first have paid any indebtedness due it from a shareholder before transferring the stock on its books where the right to the lien arises by virtue of a statute or the charter of the corporation. And an action for damages for the refusal of the company to transfer the stock will not lie until such debts are paid. But the cases using the better reasoning, hold a different rule where the claim to a lien arises by virtue of a by-law. In such case actual notice must be brought to the transferee that such by-law exists. This point is clearly made in a Mississippi case which, on account of its clarity of reasoning and its observations on the utility and office of by-laws is here adverted to at length: A certificate of stock in the Holly Springs Savings and Insurance Company was issued to B. S. Crump and by him assigned to S. D. Pinson. The certificate was silent as to any lien for the indebtedness of Crump to the company, but recited that it was transferable at the office in person or by attorney; the assignee presented this certificate and demanded a transfer which was refused on the ground that the assignor was indebted to the company. The appellate court makes the following observations: "It is well settled that at common law a corporation had no lien on the stock of its shareholders for an indebtedness to it. Such liens, when they exist, result either from a provision in the charter to that effect, or from a by-law enacted by the corporation in pursuance of authority conferred by the charter.

¹ *Vansands v. Bank*, 26 Conn. 149; see *Carroll v. Bank*, 8 Mo. App. 249.

Usually the lien, when it exists at all, is given by the charter, which being a public law, as well as the act by which it is created, is notice to all persons dealing with the company. The lien, however, may be created by a by-law. When thus created, there seems to be some diversity of opinion as to its effect against an innocent purchaser of the stock for value and without notice of the lien. Morse, in his work on Banks and Banking, page 442, denies that the lien can be created by a by-law alone as against such purchaser, and Potter on Corporations, Vol. 1, § 90 and Angell & Ames on Corporations § 355 say this is unsettled. This difference is more apparent than real, for it seems to be well recognized that a by-law has no extra-corporate force, and is only binding on those dealing with the corporation who have notice of it, or who deal with it under such circumstances that they are bound to take notice of it. A solution of the question will be found in the right determination of the categories in which notice is inferred. By-laws of private corporations are not in the nature of legislative enactments, so far as third persons are concerned. They are mere regulations of the corporation for the control and management of its own affairs. They are self-imposed rules, resulting from an agreement or contract between the corporation and its members to conduct the corporate business in a particular way. They are not intended to interfere in the least with the rights and privileges of others who do not subject themselves to their influence. It may be said with truth, therefore, that no person not a member of the corporation can be affected in any of his rights by a corporate by-law of which he has no notice. In some instances, as we have seen, if he have no actual notice he will be held to have constructive notice. In dealing with an officer or agent of the company, a third person, as in other cases of agency, is bound to ascertain the authority of the person with whom he deals. If he deals with an officer — as president or cashier — the general scope of whose duties is well known and ascertained by law, he may rely, without further inquiry, on such officer possessing the ordinary and usual powers. He is not bound by any secret limitation or restriction placed on them by the by-laws or otherwise. If he deals with such officer in relation to a matter outside these ordinary and usual powers, or with a special agent, he is bound to inquire into his authority. So, if the transaction be about a matter of which, by the terms of its charter, there must be a regulation of the company as to the mode of doing it he is bound to make inquiry as to the mode. Applying these principles to the case before us, we find that the president and the cashier are the persons usually employed to give certificates of stock, and that

the former, as head of the corporation, is the appropriate person to give the certificate in-so-far as it relates to the membership of a shareholder, and that the cashier, the executive hand of the corporation, as to its financial matters, may appropriately certify the pecuniary interest of the shareholder. Mrs. Pinson therefore was under no obligation to make any inquiry as to the power of these officers to sign the certificate of stock, and in fact their actual authority is not disputed. On looking at the charter she learned that the 'mode and manner' of making the transfer of the stock was subject to the regulations of the company by its by-laws, but she found nothing which specifically authorized the company to interfere with the power of disposing of his stock possessed by each stockholder. The president and directors were authorized to regulate the 'mode and manner' of the transfer of stock. This did not include the authority to prevent, or even to restrict the power of disposition. If this authority exist at all, it results from the general power conferred in the charter to make all needful rules and regulations for the management and control of the business of the corporation. She did not therefore have notice from the charter that there would be any by-law preventing a disposition of this stock by a debtor to the bank. The utmost that can be inferred against her on this subject is, that as there must be some mode in which the *jus disponendi* of the shareholder as to his stock must be exercised, she was bound to take notice that there was a regulation on the subject. She was bound only to know as to the 'mode and manner' of the transfer, and this information was conveyed to her in the certificate itself in the phrase 'Transferable at the office in person or by attorney.' Having this information on the face of the certificate itself, issued by the proper officers of the company, she was not bound to inquire further. She had a right to impose confidence in the terms of the certificate of the stock. That the form in which the certificates are issued is material and binding on the bank, and may be relied on by a purchaser, is well settled. It is also settled that the statements of such certificates as to the manner of their transfer constitute the regulation on that subject.¹ The power of a shareholder to dispose of his stock is not derived from the bank. It is inherent in him as a part of his proprietorship. The bank's power is simply to regulate the mode of its exercise. When this certificate said that Crump was entitled to the named shares of stock, and they were 'transferable at the office in person or by attorney,' it asserted the right of a purchaser to have the transfer made

¹ *Lanier v. Bank*, 11 Wall. 369; *Vansands v. Bank*, 26 Conn. 144.

at that place, and it asserted no more. The certificate did not even say that there were by-laws of the bank according to which a transfer was to be made, as is usual in such certificates. It contained no intimation on its face of any restriction on the power of transfer, nor did it refer to any other instrument in which such restriction might be found. The assignability of these certificates resulted from a right of a shareholder to dispose of his property. The ease with which assignments could be made was an essential element in the value of the shares, enhancing it both to the shareholder and to the bank. It is true, they are not commercial paper, but they approximate it as near as practicable.¹ The bank having adopted a form, in this case, which asserted the right to transfer with no other limitation on it than that it should be done at the office of the bank, and with no reference to the existence of any by-law or regulation which might impose other restrictions, good faith and fair dealing require that a purchaser in good faith, acting according to the terms of the certificate should be protected. But there is another ground equally conclusive against the right of the bank to assert this lien against Mrs. Pinson. The by-law under which the lien is asserted directed that notice of the lien should be given by the certificate. This was not done. It is not claimed that this certificate, as it was phrased, was authorized; in fact, it was admitted in the argument that all the certificates ever issued by the bank were in the same form. This would therefore be held to have been done with the consent of the directors, who, being stockholders, received the certificates framed as they were. The provision in the by-law requiring the notice must be held to mean that the lien would not be asserted against a person not having this notice. The by-law is binding on the company and its members as a legislative act. The company cannot be heard to assert a claim in violation of its own by-law, especially when the violation is in a matter essential to the protection of the parties against whom the claim is asserted.”²

§ 140. **Same Subject.** — A case involving the same principle as the one just quoted, but with facts somewhat the reverse, was decided in California.³ The action, however, was for the same relief, one for damages against a corporation for its refusal to make a transfer of stock on its books. In that case the certificate to the share-

¹ *Lanier v. Bank*, *supra*.

² *Bank of Holly Springs v. Pinson*, 58 Miss. 421, 38 A. R. 330. Judgment below having been for defendant in error for the full value of the shares, the appellate court modified same to the extent of giving to her judgment for the principal debt and interest, it appearing that the stock had been assigned to her as collateral security.

³ *Jennings v. Bank*, 79 Cal. 323, 29 Pac. 852, 12 A. S. R. 145, 29 Cent. L. J. 150.

holder contained the following statement: "No transfer of the stock described in this certificate will be made upon the books of the bank until after the payment of all indebtedness due to the bank by the person in whose name the stock stands on the books of the bank, except with the written consent of the president or cashier." But there was no by-law of the corporation or any resolution of the board of directors authorizing the insertion of such condition in the certificate. The assignor of the stock involved in the case, after receiving the certificate, borrowed money from the bank. Before paying this indebtedness, he assigned the stock to the plaintiff in the action who demanded its transfer on the books of the bank which was refused on account of the unpaid debt of the assignor. The court held that the action for damages for such refusal would not lie, and in the course of its opinion said: "Then was there a contract for an equitable lien? We think that such a contract must be implied from the conduct of the parties. We do not say that the mere acceptance of a stockholder of a certificate without objection would constitute a contract in the absence of subsequent dealings with reference thereto. It is not necessary to express an opinion upon such a case. But we think the acceptance without objection of the certificate containing such a condition, and the subsequent borrowing money from the bank without anything to exclude the idea that the condition was to be binding, amounts to an assent to it, so far as the particular loan was concerned, and that a contract is to be implied that the stock was to stand upon the books as security for the loan." A like holding was adhered to where the charter of the corporation provided that stock should not be transferred on the books until the debts of the stockholder were paid.¹

§ 141. **Where Certificate Fails to Disclose Lien of Corporation.**—As stated before in this article, the right of a transferee of stock to have his transfer made on the books of the company where a by-law prohibits such transfer until the debts of the shareholder to the company are paid, is determined by the knowledge or lack of knowledge of the transferee as to such by-law. The policy of the law has made certificates of shares *quasi* negotiable, assimilating them, as nearly as their character will admit, to negotiable instruments. A corporation should not, as against a *bona fide* purchaser for value of such a security, be allowed to assert a secret lien of which the paper itself contains no intimation. The general policy of the law is

¹ *Reese v. Bank*, 14 Md. 271, 74 A. D. 536; see, generally, *N. Y. & New Haven Co. v. Schuyler*, 34 N. Y. 80; *Kortright v. Bank*, 20 Wend. 91; *Union Bank v. Laird*, 2 Wheat. 390; *Pinkerton v. Railway*, 42 N. H. 427; *Blanchard v. Gas Co.*, 12 Gray 215.

against secret liens in respect to personal property; and where the corporation establishes a by-law reserving a lien upon its shares for any debt due it by the holder of such shares, it owes a duty to the public to make known that fact by printing a notice of it on the certificate of shares, or by other appropriate means.¹

§ 142. **Where Certificate Represents Stock Fully Paid.** — In a case where stock had been issued to subscribers who had paid only two-thirds of their subscriptions, yet the certificate recited that it was fully paid, the corporation was held to be liable for refusing to transfer the stock on its books even though the secretary had been ordered to call in and cancel these certificates which had been inadvertently issued as fully paid up.² A corporation is not liable in damages for refusing to transfer a fractional part of a share.³ Nor where an injunction has been issued restraining such transfer.⁴

§ 143. **Refusal of Corporation to Issue Stock.** — A liability similar to that imposed on corporations for their refusal to transfer stock has been laid upon them for their refusal to issue certificates of stock to parties entitled thereto. Thus, where the articles or by-laws of an association, formed with a view of being incorporated, provided that the shares were "transferable on the books," an action was sustained in favor of an assignee of a subscriber for refusing to issue certificates of stock although the assignment was not made on the books.⁵

§ 144. **Conversion of Shares or Certificates.** — While it was the intention to treat here only of acts of conversion committed by corporations, yet trover for the conversion of shares or certificates has so often been maintained against individuals that it is deemed advisable to consider also such cases under this heading. There has been some contention among the courts as to whether a certificate of stock is a subject of conversion and whether shares of stock may be converted and whether or not there is any distinction between the conversion of the certificate and a conversion of the shares. In examining the authorities, it is well to bear in mind what are certificates and what are shares. A share or interest in the capital stock of a corporation is a right to participate in the profits, or in the final distribution of

¹ 2 Thompson, Corporations, 2334; *Fitzhugh v. Bank*, 3 T. B. Mon. 126, 16 A. D. 90.

² *Herdegen v. Cotzhausen*, 70 Wis. 589, 36 N. W. 385.

³ *Haegele v. Western Stove Co.*, 29 Mo. App. 486.

⁴ *Purchase v. N. Y. Exchange Bank*, 3 Robt. (N. Y.) 164.

⁵ *Baltimore Railway v. Sewell*, 35 Md. 238, 6 A. R. 402; see, generally, *Hazard v. Bank*, 26 Fed. 94; *Telford Co. v. Gerhab*, 13 Atl. 90; *Helm v. Swiggett*, 12 Ind. 194; *Smith v. Mining Co.*, 1 Nev. 423; *Blair Co. v. Rose*, 26 Ind. App. 487; *Doty v. Bank*, 3 N. D. 9; *Ralston v. Bank*, 112 Cal. 208, 44 Pac. 476.

the corporate property *pro rata*.¹ And it is generally considered to be personal property.² It is not the certificate which confers the right to, or ownership of, the share, nor is the certificate the stock itself, but only the paper evidence of the right or title to the share which may be used for the purpose of symbolical delivery, as the share itself, being intangible, is not susceptible of actual delivery. As thus evidenced, the certificate is the written expression of the legal existence of such share, giving to that which is intangible a tangible representative, by which as a convenient method it may be sold, transferred or speculated in as other personal property. A share then exists in legal contemplation and is personal property, which may be dealt with, enjoyed, and subjected to judicial process as such and of which the certificate is not the property itself but only documentary evidence of title to it.³ It is therefore held that it is the shares of stock that constitute the property which belongs to the shareholder. Otherwise the property would be in the certificate; but the certificate is only evidence of the property; and it is not the only evidence, for a transfer on the books of the corporation, without the issuance of a certificate, is therefore additional evidence of title, and if trover is maintainable for the certificate, there is no valid reason why it is not maintainable for the thing itself which the certificate represents.⁴

§ 145. **Same Subject.** — At common law, trover was the proper remedy for a conversion of personal property, but it lay only for tangible property capable of being identified and taken into actual possession. The conversion of the property was the gist of the action; and the action did not lie, unless the defendant had become actually possessed of the property by some means, whether by finding or otherwise. Shares of stock and such things did not belong to that class of property known as chattels; they were considered incorporeal, intangible things, which existed in idea, and were incapable of being subjected to actual possession. Nor were they supposed to denote possession; for they had no other evidence of an existence than the certificate which was issued to the person who claimed the right to what the certificate represented. That right consisted of the privilege of voting in the concerns of the corporation, and of participating in the profits of the business of the corporation. It subsisted only in law or contract. It was not a right to a thing not in posses-

¹ Field v. Pierce, 102 Mass. 261.

² Bouvier's L. Dict., title "Stock."

³ Budd v. Street Railway Co., 12 Ore. 271, 7 Pac. 99, 53 A. R. 355; second appeal of this case, 15 Ore. 413, 3 A. S. R. 169.

⁴ Payne v. Elliott, 54 Cal. 339, 35 A. R. 80.

sion, but in action. The certificates themselves were not considered property, but were considered evidence of property. Wherever common law ideas of personal property prevail, courts hold that trover is not the proper remedy for the conversion of things which were considered at common law as mere personal rights, not reducible to possession, but recoverable by law.¹

§ 146. **Same Subject.** — The Pennsylvania courts have held that the shares of stock are not such tangible property as to be subjects of conversion, the certificates alone possessing the necessary attributes of personal property to render them proper subjects of an action of trover for their conversion. In one case the court of this state said: "It (the share of stock) is a right to a certain proportion of the capital stock of a corporation — never realized except upon the dissolution and winding up of the corporation — with the right to receive in the meantime such profits as may be made and declared in the shape of dividends. Trover can no more be maintained for a share of the capital stock of a corporation than it can for the interest of a partner in a commercial firm."² But the views of this court are not approved in this regard by the judicial decisions of other states. And, in fact, no reason suggests itself, other than one based on technicalities, why a certificate — the muniment of title of the shareholder to his shares — should be held a proper subject of conversion, and the shares themselves — in reality the property of the shareholder — should be considered too intangible to be converted. The certificate itself has no real value; it is only a representative of something of value, the evidence of it. If a certificate of stock is unlawfully retained when demanded, what is presumed to have been converted? The certificate has no intrinsic value disconnected from the stock it represents. No one would say that the paper alone has been converted — that the conversion of the paper constitutes the entire wrong. In these days when the tendencies of courts is to do away with technicalities not based upon reason, a technical distinction of this character should no longer be sustained.³

§ 147. **Either Certificate or Shares May be Converted.** — At all events, the system of code pleading, wherever adopted, does away with such distinctions, for, the forms of action being abolished, only substantial rights of the parties in the action are considered; and it is accordingly held that the shares constitute the property of the stockholder and that trover will lie for either the shares themselves

¹ *Payne v. Elliott, supra.*

² *Neiler v. Kelly*, 69 Pa. St. 403; *Sewall v. Bank*, 17 Serg. & R. 285 (Pa.).

³ *Ayres v. French*, 41 Conn. 142.

or the certificate representing them.¹ In fact, if there has been a conversion of a certificate there has ordinarily been a conversion of the shares themselves, although there has been an instance where trover was sustained for a certificate when there had been no actual conversion of the shares. In this case a certificate of stock belonging to the plaintiff, by being inadvertently mixed with some of the defendant's papers, came into the latter's possession. Upon discovering this, the defendant refused to surrender possession until certain matters were adjusted between him and plaintiff. The latter brought trover for a conversion of the certificate. There was no evidence that the defendant had ever made any use of the certificate for his own purposes, nor was it indorsed so that he could have procured a transfer of it on the books of the company. Plaintiff had never been denied his rights as a shareholder in the corporation. In the course of its opinion, the court said: "We see no reason why, if the shares are converted by means of a wrongful use of the certificate, the owner in suing may not count upon the conversion of either. The shares are the property converted, but the certificate itself is also property standing as it does as the representative of the shares, and as its conversion may take the shares from the owner, it seems to be as proper to count upon its conversion as upon the conversion of money or any chattel. In this case there neither was nor could be any conversion of the stock, for though the defendant had the certificate in his possession, he could not make use of it. It stood in the name of the plaintiff, and could not be transferred without the plaintiff's indorsement, which it did not have, and the defendant could make neither the certificate nor the shares the property either of himself or of any third person by anything he could do with the certificate. If therefore it were necessary to show a conversion of the stock in order to make out a conversion of the certificate this suit would fail. But conversion does not necessarily imply a complete and absolute deprivation of property; there may be a deprivation which is only partial or temporary, and where the property of the plaintiff remains in or is restored to him. There may therefore have been a technical conversion in this case though no use was made of the certificate."²

§ 148. **Same Subject.** — The Supreme Court of the United States has held a conversion of the certificate to be a conversion of the stock itself. In a case originating in Utah the court announced the principle above set out and held as follows: "It is true that the certificate of stock is not the stock itself; but it is documentary evidence

¹ *Boylan v. Huguet*, 8 Nev. 345.

² *Daggett v. Davis*, 53 Mich. 35, 18 N. W. 548, 51 A. R. 91.

of title to the stock, and may be used for the purpose of symbolical delivery, as the stock itself is incapable of actual delivery. A blank endorsement of a certificate may be filled up by writing an assignment and power of attorney over the signature indorsed, and in this way an actual transfer of the stock on the books of the corporation may be perfected. A wrongful use of such an indorsed certificate for such a purpose may operate as a conversion of the stock.”¹

§ 149. **Illustrations of the Rule.** — Having shown that according to the weight of authority either the certificate or the shares of stock may properly be subjects of conversion, I will notice the facts in some of the cases where the question has arisen. And it may be noted that in this connection the injured owner has an election of remedies — he may follow and reclaim the stock, or he may recover damages for its conversion.² That a corporation is liable for a conversion for refusing to register a proper transfer, or for issuing a certificate to the wrong person, or for otherwise hindering the owner in the free use and enjoyment of his stock, has been seen in former sections of this chapter. And individuals are equally liable in case they thus wrongfully interfere. The widow and heirs of a decedent who had owned a certificate of stock indorsed the certificate, prior to the appointment of the widow as administratrix, and sent it by one of the heirs to a certain person for sale. Subsequently such heir, without the consent of the widow and other heirs, agreed to pledge the certificate as security for a debt of his and gave an order on the custodian for it to the creditor who thus came into possession of it and sold it. The court held this a conversion of the certificate and consequently of the shares which it represented.³ In a case where the defendant had purchased stock for the plaintiff, held it for some time, and finally accounted for it to the plaintiff, he was held guilty of a conversion for refusing to account for dividends which accrued while the stock was in his keeping.⁴ A holder of stock in an insolvent company delivered his stock to another person to be used under a re-organization agreement. The latter agreed to pay the assessments on the stock and deliver the new securities upon repayment of the amount paid out as assessments. But he refused to deliver the new securities, and in an action of trover against him the court held him liable for a con-

¹ *McAllister v. Kuhn*, 96 U. S. 87, 24 L. Ed. 615; see, generally, *Hine v. Commercial Bank*, 119 Mich. 448, 78 N. W. 471; *Bank v. McNeill*, 10 Bush 54; *Jarvis v. Rogers*, 15 Mass. 389; *Herrick v. Humphrey Co.*, 73 Neb. 809, 103 N. W. 685; *Jones v. Ortel*, 114 Md. 205, 78 Atl. 1030; *Freeman v. Harwood*, 49 Me. 195; *Sturges v. Keith*, 57 Ill. 451, 11 A. R. 28.

² *Moore v. Baker*, 4 Ind. App. 115, 39 N. E. 629, 51 A. S. R. 203.

³ *Morton v. Preston*, 18 Mich. 60, 100 A. D. 146.

⁴ *Shaughnessy v. Chase*, 7 N. Y. St. R. 293.

version of the shares.¹ The cashier of a national bank was also treasurer of a savings bank. He took bonds of the savings bank, and as cashier and manager of the national bank, pledged them as security for an advance to the national bank, and they were afterwards sold by the pledgees and the proceeds were credited to the national bank. The court held the national bank liable to the savings bank for the value of the bonds in trover, although the directors of the national bank were ignorant of the transaction.² In a Nebraska case,³ the president of the defendant bank informed the plaintiff that the bank was about to be reorganized, and that if he would act as a director, and his firm would continue to give the bank their business and use their influence in its behalf, they would give him ten shares of the stock. The plaintiff acceded, was elected and served as director, and his firm continued to give the bank their business. The court held the agreement valid and enforceable against the bank, and its refusal to deliver the shares constituted a conversion of them. A prior owner of a certificate of stock who had assigned the certificate to a *bona fide* purchaser, caused the corporation to refuse to transfer the stock on its books by presenting to the corporation an affidavit that he had lost the certificate and procured a new certificate to be issued in its stead by executing a bond "to save said company harmless from all loss or damage by reason of said second issue of stock, and from any liability on account of said certificates and of stock described in said affidavit." The purchaser and holder of the original certificate was permitted to maintain trover for the value of the shares against his assignor.⁴ Another case was an action for the wrongful conversion by a bank of shares of stock actually owned by the plaintiff and deposited by him with the bank as security for a loan of money for which the plaintiff had given his personal obligation, with authority to sell the shares only in case the plaintiff should, on demand, fail to repay the loan. It did not appear that the shares were held for speculative purposes, but it was justly inferable, from the circumstances, that they were held for investment and would have been retained by the plaintiff but for the wrongful sale. The bank sold the shares without any notice or demand for payment. On being informed of the sale, the plaintiff promptly refused to ratify it and required the bank to replace the shares. Pending negotiations with that view, the bank failed and the plaintiff sued the receiver

¹ *Miller v. Miles*, 58 N. Y. App. Div. 103, 68 N. Y. Supp. 565, 171 N. Y. 675, 64 N. E. 1123.

² *Fishkill Savings Inst. v. National Bank*, 80 N. Y. 162, 36 A. R. 595.

³ *Rich v. Bank of Lincoln*, 7 Neb. 201, 29 A. R. 382.

⁴ *Greenleaf v. Ludington*, 15 Wis. 558, 82 A. D. 698.

for a wrongful conversion of the shares, which action was sustained.¹

§ 150. **Irregular Sale of Stock for Unpaid Assessments.** — A corporation may be liable in trover for the conversion of a stockholder's shares where it sells them for unpaid assessments, unless the sale is conducted strictly according to statutory provision therefor, or, in the absence of such statutory provision, according to a just and reasonable procedure.² It has been said that three things are necessary to a valid forfeiture of shares: 1. An authority to forfeit derived from statute; 2. An expressed intention to forfeit; and 3. The intention carried into effect with due formality.³ It is with the last two requirements that the law of trover is concerned. A forfeiture is effected in one of two ways: The forfeiture may be a strict foreclosure of the stock; that is, the taking of the stock by the corporation itself; or it may be a public sale of the stock for non-payment of the subscription.⁴ A notice to the stockholder in arrears that unless payment is made by a time certain his shares will be forfeited is generally required as a preliminary to a valid forfeiture. Statutory requirements or provisions of the charter specifying the contents of the notice, the time and place of forfeiture must be strictly complied with. Failure in these particulars will render the forfeiture invalid. So, a private sale where a public one is prescribed will be set aside.

§ 151. **Remedy of Stockholder for Wrongful Sale.** — A stockholder whose stock has been irregularly or illegally sold under an attempted forfeiture has two remedies which he may, at his option, pursue — one is in equity, the other at law. He may obtain a decree setting aside the forfeiture, or, prior to the actual sale, he may enjoin the threatened forfeiture. At law he may sue in trover for the conversion of his shares. In one case a by-law of the defendant, which was made one of the terms and conditions of the stock certificates, as the same were printed and issued, requiring and providing for a sale at public auction, in case of a failure to meet the prescribed monthly payments for a period of six months, was ignored and disregarded, to the extent that the sale was in the directors' room in the offices of the corporation, and no open, public or general notice of the same was ever given. By the same by-law it was also provided that whenever any stock was to be sold for arrearages in the monthly payments, a notice should be mailed to the owner of the stock ten

¹ *Romaine v. Van Allen*, 26 N. Y. 309.

² *Rutland Co. v. Thrall*, 35 Vt. 536.

³ 1 *Thompson, Corporations*, 1762.

⁴ *Cook, Corporations*, 396.

days at least before the day of the sale, stating the time and place of such sale. This express and important provision was also ignored and disregarded and the sale made without any attempt to notify stockholders in default, by mail or in any other manner. The corporation bid in the stock for the amount of the assessment and fines which, according to the by-laws, *ipso facto* cancelled the stock. The appellate court held the sale irregular and void and judgment was rendered against the corporation for the value of the stock.¹ In this case it was contended that the action of trover would not lie under the circumstances. But the court said: "The fact that the right to follow and recover the property itself can be exercised does not stand in the way of an action to recover its value, if the owner elects to pursue that remedy. He may have a choice of remedies, but we cannot see why he may not adopt the one selected by plaintiff as to that part of the stock bid in and appropriated by the association itself, if he has that power as to the stock which it caused and permitted to be bid in and appropriated by third parties. It is certainly immaterial to the corporation which course is followed, for in one case the stock would be recovered, in the other its value only. When the elements exist which are essential to authorize or constitute an action for conversion of shares of stock, or one in the nature of a special action on the case, it must, on principle, be wholly immaterial who has become the purchaser at the sale, or whether it sold for the amount due for arrearages, and for which the corporation had a lien, or for more than that amount. The right of action in either case is founded upon the fact that there has been a distinct act of dominion wrongfully exercised over the stockholder's property, inconsistent with his right and in denial of it. The defendant practically deprived the owner of his stock, and the advantages accruing from its ownership, by bidding it in for itself. This was an act of interference subversive of the right of the stockholder to enjoy and control the stock, and may be treated by him as a conversion of his property."² In another case the statute gave the directors of private corporations the power to pass by-laws providing for the sale of delinquent stock for unpaid assessments, providing such by-laws were not inconsistent with any existing law. But in this particular case a majority of the board of directors, by a resolution directed only against plaintiff's stock, ordered it sold. The stock was sold pursuant to

¹ *Allen v. American Bldg. & Loan Assoc.*, 49 Minn. 544, 52 N. W. 144, 32 A. S. R. 574.

² *Id.*, citing, *Morawetz, Corporations*, secs. 208, 567; *Cook, Stock & Stockholders*, sec. 576; 1 *Lawson's Rights, Rem. & Practice*, sec. 466.

this resolution. The plaintiff's action against the corporation was for a conversion of the shares. The court sustained the action, holding that the resolution did not fulfill the statutory requirements of a by-law, and the sale of the stock was irregular and void.¹

§ 152. **Agreement of Parties may Preclude Trover.** — But it is not every act of dominion over shares in a corporation belonging to another that will subject a party to an action of trover. The agreement between the parties may preclude this. Thus, it is held that a person entitled to stock on a contract cannot maintain trover for a failure to deliver.² Nor will trover lie where stock has been delivered to the defendant to sell and use the proceeds in business.³ So, in Pennsylvania it was held that trover does not lie by one joint speculator against another for stock which the former hands to the latter to use as collateral security in their speculations, even though the latter sold the stock and used the proceeds in speculation.⁴ And where several stockholders agreed that a number of their shares should be sold for the benefit of the corporation, it was held that one could not refuse to permit his shares to be sold after the others had contributed their proportion under the agreement; and when the corporation took possession of his shares and sold them, it was absolved from liability to him for a conversion of the shares.⁵ And where the purchaser of a certificate sent it to the corporation for transfer and the secretary replied that the corporation had a lien on the stock, the corporation was held not liable for a conversion of the stock, no demand for a return of the certificate having been shown.⁶ And where the plaintiff accepts a return of the stock after suit brought, he can recover only nominal damages.⁷

§ 153. **Conversion of Trust Property.** — A corporation is charged with many of the duties of a trustee toward its stockholders and is bound to exercise proper care and diligence in protecting the title of a *cestui que trust* or equitable or beneficial owner, and is responsible for any injury sustained by its negligence or misconduct. Its stock being transferable on its books, it is made the custodian of its shares and is clothed with power to protect the rights of its shareholders from unauthorized transfers. And it is said that when the large amount of corporate securities held in trust throughout the country

¹ *Budd v. Multnomah Ry. Co.*, 15 Ore. 413, 15 Pac. 659, 3 A. S. R. 169.

² *Reid v. Caldwell*, 114 Ga. 676, 40 S. E. 712.

³ *Borland v. Stokes*, 120 Pa. St. 278, 14 Atl. 61.

⁴ *Martin v. Megargee*, 212 Pa. St. 558, 61 Atl. 1023.

⁵ *Conrad v. La Rue*, 52 Mich. 83, 17 N. W. 706.

⁶ *Cummins v. People's Assoc.*, 61 Neb. 728, 86 N. W. 474.

⁷ *Owen v. Williams*, 38 Col. 79, 89 Pac. 778; *Collins v. Lowry*, 78 Wis. 329, 47 N. W. 612.

for a class of beneficiaries who are generally dependent entirely upon the fidelity and diligence of the corporation issuing same are considered, courts of equity will not be eager to condone negligence nor to put a premium upon infidelity.¹ In the case cited the corporation had transferred some of its stock to a life-tenant and issued a new certificate to him, failing to state therein that his interest was only a life-tenancy; the corporation also represented to a purchaser that the certificate was all right. The corporation was held liable to the remainderman for a conversion of the stock. So, a bank was held to the same liability where it permitted a transfer to the life-tenant by the executors themselves.² Where stock was specifically bequeathed in trust to a life-tenant and then for her children after her death, the corporation permitted the executor of the will to transfer the stock to the trustee as trustee for the life-tenant only. Subsequently the trustee, with the consent of the corporation, sold and transferred the stock to a purchaser in good faith. Upon a suit by the remainderman, the corporation was held liable for permitting the second transfer.³ In the case last cited, the court said: After mature consideration of all the cases cited and the text in the law books to which our attention has been called, our opinion is: First, that where transfer of stock of a corporation is made on its books by an executor, the corporation is fixed with a knowledge that there is a will, and is chargeable with a knowledge of its contents to the same extent as if its officers had actually read it; second, that notwithstanding such knowledge of the contents of the will, the executor may, even with intent to convert to his own use the money, sell and transfer such stock to a purchaser under the corporation's supervision, and that, even though the stock be specifically bequeathed in the will, without liability on the part of the corporation unless it has at the time of the transfer reasonable ground to believe that the executor intends to misapply the money, or is in the very transaction applying it to his own private use. We have arrived at the conclusion, however, that, as the corporation is fixed with knowledge of the contents of the will, when the executors transfer stock on its books, the provisions of the will in reference to the stock must be carried out in the transfer at the peril of the company in cases where the transferee is a legatee named in the will; that is, the corporation must, at the time of the transfer, ascertain whether the transfer is to a purchaser from the executor in the usual course of administration

¹ *Caulkins v. Gas & Light Co.*, 85 Tenn. 683, 4 S. W. 287, 4 A. S. R. 786.

² *Cox v. First Nat'l Bank*, 119 N. C. 302, 26 S. E. 22.

³ *Wooten v. Wilmington Ry.*, 128 N. C. 119, 38 S. E. 298, 56 L. B. A. 615.

and the regular execution of his duties as executor or to a legatee named in the will.¹

§ 154. **Sale of Stock Held in Trust.** — It is the duty of a trustee to keep and preserve the trust property, and to apply the income according to the terms of the instrument creating the trust. And ordinarily a trustee cannot sell stock in a corporation held in trust, even though such sale be for the purpose of investing the proceeds in other property.² And where a corporation has notice that a stockholder holds his stock in trust for another, and the means of ascertaining the character of the trust are at hand, the corporation is bound to refuse to permit a transfer of the stock unless the trustee has in fact the power to sell.³ The corporation is liable if the transfer by the trustee was unauthorized.⁴ Thus, where trustees under a will held registered bonds which were registered to them as trustees, the corporation was held liable for allowing one of the trustees to transfer such bonds, the transfer being a breach of trust on the part of the trustee.⁵ In the case last cited, the court said: "The word 'trustee' means something. It is a warning and declaration to every one who reads it (1) that the person so named is not the owner of the property to which it relates; (2) that he holds it for the use and benefit of another; (3) that he has no right or power to sell or dispose of it without the assent of his *cestui que trust*." Where, upon re-organization, the committee issues certificates which may be exchanged for stock of the new corporation after it is organized, and a trustee illegally transfers the certificates issued to him, the corporation is liable for permitting such transferee to exchange the certificate for stock.⁶

§ 155. **Conversion of Special Deposits by Banks.** — Another question of conversion by a corporation relates almost exclusively to banks and banking. This involves what the law knows as special deposits. In defining a special deposit, Thompson has said: "No better rule can be stated by which to determine this question, than to say that a deposit is not a general deposit, such as creates the relation of debtor and creditor between the bank and the depositor, but is a special deposit, where the right of property does not change, but where the property is to be held by the banker as bailee or trustee,

¹ Wooten v. Wilmington Ry., 128 N. C. 119, 38 S. E. 298, 56 L. B. A. 615; see, in general, Lowell, Transfer of Stock, art. 152; St. Romes v. Cotton Press Co., 127 U. S. 614, 32 L. Ed. 289, 8 Sup. Ct. Rep. 1335.

² Cook, Corporations, art. 323.

³ Bayard v. Farmers Bank, 52 Pa. St. 232.

⁴ Geyser-Marion Co. v. Stark, 106 Fed. 558.

⁵ Cooper v. Railway Co., 38 N. Y. App. Div. 22, 57 N. Y. Supp. 925.

⁶ Mobile Railway Co. v. Humphries, — Miss. —, 7 So. 522.

and hence where it is impressed with the character of a trust fund.”¹ Upon this subject question has more frequently arisen upon the bank’s becoming insolvent, and the matter determined has been whether the depositor was entitled to have his deposit returned to him in full, or whether he is required to take his *pro rata* distributive share. If he can trace his property and identify it, he should have the right to claim it in full. But where the special deposit has been converted by the bank and mingled with its own property, the depositor is not entitled to be paid in full if the assets are insufficient to pay all creditors, but he must take his *pro rata* share along with other creditors. Several reasons have been adduced in support of this conclusion: (1) The man who trusts his property with a depositary for safe-keeping does not repose any more trust or confidence in him than the man who intrusts his money to his safe-keeping to be paid back to him on his check; and the former occupies no better position morally than the latter. (2) Where the depositary becomes insolvent and his assets are not enough to satisfy the demands of all his creditors, if one of them is paid in full, in-so-far as he gets more than what his *pro rata* share would have been, he is paid out of money belonging to others. (3) His claim against the depositary is in the nature of a right of action for damages for a tort, which tort consists of the conversion of his special deposit.²

10. MUNICIPAL CORPORATIONS

§ 156. **Liability for Torts in General.** — In discussing the liability of a municipal corporation in trover, it is necessary to outline some of the principles of law determining the liability of such corporation for torts in general. If there be an express statute creating, or declaring or limiting such liability, of course the courts have but to apply such statute to the facts of each particular case. But the difficulties arising under the subject, which have confronted the courts, have presented themselves in cases where an implied liability has been asserted against the municipal corporation on account of the misconduct or neglect of the corporation or its officers or agents in regard to the performance of corporate duties.

§ 157. **Distinction between Municipal and Quasi-Municipal Corporations.** — In this connection, there is a distinction between municipal corporations proper and those known as *quasi-municipal* corporations. The former embrace towns and cities organized

¹ Thompson, Corporations, art. 7099.

² Thompson, Corporations, 7102, *et seq.*, citing *Cavin v. Gleason*, 105 N. Y. 256, 11 N. E. 504.

voluntarily or specifically chartered under general acts; while the latter exist under statutes specifically creating them and are known as counties, townships and school districts. There is a marked distinction in the extent of the liability held against the two classes by the courts, the former being subject to a more extended responsibility for their acts than the latter. It is of the corporations that are strictly municipal that I propose to treat.

§ 158. To Create Liability Act Must be within Scope of Power.

— The rule of law is a general one that the superior or employer must answer civilly for the negligence or want of skill of his agent or servant in the course or line of his employment by which another, who is free from contributory fault, is injured. Municipal corporations, under the conditions herein stated, fall within the operations of this rule of law, and are liable, accordingly, to civil actions for damages when the requisite elements of liability exist. To create such liability, it is fundamentally necessary that the act done which is injurious to others must be within the scope of the corporate powers as prescribed by charter or positive enactment (the extent of which powers all persons are bound at their peril to know); in other words, it must not be *ultra vires* in the sense that it is not within the power of the corporation to act in reference to it under any circumstances. If the act complained of necessarily lies wholly outside of the general or special powers of the corporation as conferred in its charter or by statute, the corporation can in no event be liable to an action for damages whether it strictly command the performance of the act, or whether it be done by its officers without its express command; for a corporation cannot, of course, be impliedly liable to a greater extent than it could make itself by express corporate vote or action. But if the wrongful act be not in this sense *ultra vires*, it may be the foundation of an action in tort against the corporation, either when it was done by its officers under its previous direct authority, or has been ratified or adopted, expressly or impliedly, by it, or when it was done by the officers, agents or servants of the corporation in the execution of corporate powers or the performance of corporate duties of a ministerial nature, and was done so negligently and unskillfully as to injure others, in which case the corporation is liable for the carelessness or want of skill of its officers or immediate servants or agents in the course of their authorized employment, without express adoption or ratifying act. Such are the general principles of our jurisprudence concerning which there is no disagreement. But when we come to their application, considerable difference of opinion will be found to exist as to what are, and what are not acts *ultra vires*, and what

powers and duties are, within the meaning of the rule as stated, corporate powers and duties; for if the duty, though devolved by law upon officers elected or appointed by the corporation, is not a corporate duty, the officers of the corporation, in performing it, do not act for the corporation, and hence the corporation is not responsible (unless so expressly declared by statute) for the omission to perform it or for the manner in which it is performed.¹

§ 159. *Ultra Vires Acts*. — As already outlined, it is a good defense to an action of tort against a municipal corporation to show that in the doing of the act complained of it went beyond the powers given to it, or, in other words, that as to it the act was *ultra vires*. An act of the corporation is *ultra vires* when it was impossible in contemplation of law for it, under any circumstances, to have authorized the doing of the act. There is no contradiction of this rule of non-liability, but the difficulty, as remarked by Dillon, is in bringing the facts of particular cases to such a point that it can be determined whether or not they come within the rule.

§ 160. *What Duties Imposed on Municipal Corporation*. — It has been said that there are two kinds of duties imposed upon municipal corporations, in respect to which there is a clear distinction — one is imposed for governmental purposes, and is discharged in the interest of the public, and the other arises from the grant of some special power, in the exercise of which the municipality acts as a legal individual. In the latter case the power is not held or exercised by the municipality as or because it is one of the political subdivisions of the state and for public or governmental purposes, but as and because it is, as an individual might be, the grantee of such power for private purposes. In such case a municipality is on an equal footing with a private grantee of the same power, and is, like him, liable for an injury caused by the improper use of such power. But where the power is conferred upon a municipality as one of the political subdivisions of the state, and conferred, not from any benefit to result therefrom to such municipality, but as a means in the exercise of the sovereign power for the benefit of the public, the corporation is not answerable for non-feasance or mis-feasance by its public agents.²

§ 161. *Same Subject*. — Similarly, the Ohio courts have de-

¹ 2 Dillon, *Mun. Corp.*, art. 968, *in toto*. And see the list of cases there cited outlining the general principles governing the liability of municipal corporations in actions of tort.

² *O'Rourke v. Sioux Falls*, 4 S. D. 47, 46 A. S. R. 760, 19 L. R. A. 789, citing *Maximilian v. New York*, 62 N. Y. 160, 20 A. R. 468; *Eastman v. Meredith*, 36 N. H. 284, 72 A. D. 302; *Robinson v. Greenville*, 42 Ohio St. 625, 51 A. R. 857; *Lafayette v. Timberlake*, 88 Ind. 330.

clared that it is the duty of the state government to secure to the citizens of the state the peaceful enjoyment of their property, and its protection from wrongful and violent acts. For the proper discharge of this duty, power is delegated in different modes. One of these is the establishment of municipal corporations. Powers and privileges are also conferred upon municipal corporations to be exercised for the benefit of the individuals of whom such corporations are composed, and in connection with these powers and privileges, duties are sometimes specifically imposed. It is obvious that there is a distinction between those powers delegated to municipal corporations to preserve the peace and protect persons and property, whether to be exercised by legislation or the appointment of proper officers, and those powers and privileges which are to be exercised for the improvement of the territory comprised within the limits of the corporation, and its adaptation to the purposes of residence and business. As to the first, the municipal corporation represents the state — discharging duties incumbent on the state. As to the second, the municipal corporation represents the pecuniary and proprietary interests of individuals. As to the first, responsibility for acts done or omitted is governed by the same rule of responsibility which applies to like delegations of power. As to the second, the rules which govern the responsibility of individuals are properly applicable.¹

§ 162. **Attempted Enforcement of Illegal Ordinance.** — A municipal ordinance void because the laws of the state do not permit the corporation to do the acts contemplated by the ordinance, is analogous to a law of the state passed in contravention of some constitutional provision — the attempted enforcement of either is *ultra vires*, and one injured thereby either in person or property is without recourse except as against those who are instrumental in the attempted enforcement.² The determination of liability has been put upon the ground of agency, it being said that if the officers or employees of a municipality, whether pursuant to a vote of the city by its common council or not, engage in an act which the latter had no power to authorize, they are not, while so engaged, the representatives of the municipality, and it is therefore not liable for their negligence or misconduct.³

§ 163. **Whether Liability of Municipal Corporation Implied.** —

¹ *Western College v. Cleveland*, 12 Ohio St. 377.

² *Worley v. Columbia*, 88 Mo. 106; *Chicago v. Turner*, 80 Ill. 420; *Lemon v. Newton*, 134 Mass. 376.

³ *Smith v. Rochester*, 76 N. Y. 506.

Judge Dillon likens the liability of a municipal corporation in actions of tort where the defense of *ultra vires* is asserted to an action on contract also alleged to be *ultra vires*; and, in concluding that in such action of tort there can be no implied liability on the part of the municipality, pertinently inquires of what use are the limitations of the chartered corporate powers.¹ In other words, why limit the powers conferred upon a municipal corporation if such limitation is to be overridden by an implied liability against the corporation for acts which the authority creating it says the corporation shall not do? The same author continues: It is not meant, however, to affirm that the non-liability of a municipality in tort for acts that are wholly and necessarily *ultra vires*, is precisely commensurate with and under no circumstances greater than its liability in respect of contracts thus *ultra vires*. But if there be such enlarged liability, the cases which are supposed to assert it are few in number, exceptional in their nature, and if they are well decided, other sufficient grounds of judgment will be found to exist.² At all events, the author confesses his inability, upon the decisions as they stand, to formulate a statement of the conditions and principles which determine and fix such liability. It is useless, if not dangerous, to generalize upon the subject. It is far safer, and more in accordance with the genius of our jurisprudence to deal with such cases as they arise. On such a sea we can sail with safety only so long as we keep the shore line and the lights of the actual adjudications in plain sight.³

§ 164. **Unlawful Acts, but Within Scope of Municipal Power.**— In any particular action of tort against a municipality, if the wrong complained of was committed in the performance of an act which the corporation had a right to do in a certain manner or under particular circumstances, but the act was done in a different manner or under different conditions, then such act is not *ultra vires* and such a plea would constitute no defense to the action. In such case, it is not always, nor generally, a defense to allege that the act was wrongful and unlawful and, therefore, the corporation had no power to do it, and that the act was that of the person doing it and not of the municipality. Otherwise, a municipality would in no event be liable in tort.

§ 165. **Same Subject; Acts of Agent in Good Faith.**— The general rule seems to be that if the agents of a municipality, while acting

¹ Dillon, Mun. Corp., 969a.

² Citing *Cohen v. New York*, 113 N. Y. 532, 21 N. E. 700: *Stanley v. Davenport*, 54 Ia. 463, 2 N. W. 1064 and 6 N. W. 706.

³ Dillon, Mun. Corp., 969a.

in good faith in the prosecution of its business, commit a tort, the municipality cannot defend an action therefor on the ground that it had no power to authorize its agents to do the act complained of. This rule is based upon the proposition of the good faith of the officers in the furtherance of the interests of the municipality, and is analogous to the principle applicable to private corporations that a plea of *ultra vires* will not be permitted to prevail unless in furtherance of justice. As was said in one case: "Where officers of a town acting as its agents do a tortious act with an honest view to obtain for the public some lawful benefit and advantage, reason and justice require that the town in its corporate capacity should be liable to make good the damage sustained by an individual in consequence of the acts thus done."¹

§ 166. **Same Subject.** — There are cases holding, with an extreme view, to an opposing principle. As was said by a Missouri court: "It is the rule of this state, in this class of cases, that the corporation is liable for the acts of its agents, injurious to others when the act is in its nature lawful and authorized, but done in an unauthorized manner, or unauthorized place, but is not liable for injurious and tortious acts which are, in their nature, unlawful and prohibited."² It seems to me that the fallacy of this reasoning is in the fact that, while professing to hold municipal corporations liable for the tortious acts of their agents under certain conditions, yet it in fact absolves them from liability in all cases. For, to come within the purview of the cases, before municipal liability would attach, it would be necessary that the corporation be given the power or authority to commit a wrong — an anomaly unknown to the law.

§ 167. **Same Subject.** — I prefer the principle announced by the New York court in a case where the city had granted to a grocer, for a consideration, a license to keep a wagon standing in front of his store, by the falling of the thills of which wagon a person was killed. The city was prohibited by law from permitting the streets to be obstructed, and, therefore, its act in granting the license was unlawful. In an action for the killing of the deceased, the court said: "When the city, without the pretense of authority, and in direct violation of a statute, assumes to grant to a private individual the right to obstruct the public highway while in the transaction of his private business, and for such privilege takes compensation, it

¹ *Hawks v. Charlemont*, 107 Mass. 417.

² *Worley v. Columbia*, 88 Mo. 110; *Chicago v. Turner*, 80 Ill. 420; *Cavanaugh v. Boston*, 139 Mass. 426, 1 N. E. 834, 52 A. R. 716; *Trammell v. Russellville*, 34 Ark. 105, 36 A. R. 1.

must be regarded as itself maintaining a nuisance so long as the obstruction is continued by reason of and under such license, and it must be liable for all damages which may naturally result to a third party who is injured in his person or his property by reason or in consequence of the placing of such obstruction in the highway. This is none too severe a liability. It is to be hoped that its enforcement will tend to a discontinuance of a custom of granting permits or licenses to do what it is well known the city has no right to authorize or license. Such licenses, it is a matter of public notoriety, are constantly granted without any semblance of legal authority, and the licensees are continually acting under them, and obstructing the public streets, to the serious inconvenience and danger of the public. When it is understood that such license has not only no effect in the way of legalizing an obstruction, but that it simply makes the city a partner in the maintenance of a public nuisance, and is liable for damages caused thereby, such knowledge may, perhaps, restrain the utterly illegal practice and tend in some degree to the protection of the public in the lawful use of its own highways.”¹

§ 168. **Same Subject; Illustrations.** — In a case already referred to,² in sustaining the principle announced in the preceding section, the court remarked that the contrary doctrine would be injurious to the person damaged and to the agents employed by the town. It would also be injurious to the town by paralyzing the energies of such agents or officers, as they would be likely to refuse to act when prompt action is important. And, anent the subject under discussion, Judge Cooley, in deciding a case, used this language: “It is very manifest from this reference to authorities, that they recognize in municipal corporations no exemption from responsibility where the injury an individual has received is a direct injury accomplished by a corporate act which is in the nature of a trespass upon him. The right of an individual to the occupation and enjoyment of his premises is exclusive, and the public authorities have no more liberty to trespass upon it than has a private individual. If the corporation send people with picks and spades to cut a street through it without first acquiring the right of way, it is liable for a tort; but it is no more liable under such circumstances than it is when it pours upon its land a flood of water by a public sewer so constructed that the flooding must be a necessary result. The one is no more unjusti-

¹ *Cohen v. New York*, 113 N. Y. 532, 21 N. E. 700, 10 A. S. R. 506; *Irvine v. Wood*, 51 N. Y. 224, 10 A. R. 603; see *Sullivan v. Royer*, 72 Cal. 248, 13 Pac. 655, 1 A. S. R. 58.

² *Hawks v. Charlemont*, 107 Mass. 417.

fiable, and no more an actionable wrong than the other. Each is a trespass, and in each instance the city exceeds its lawful jurisdiction. A municipal corporation never could give authority to appropriate the freehold of a citizen without compensation, whether it be done through an actual taking of it for streets or buildings or by flooding it so as to interfere with the owner's possession."¹ Yet some authorities under the doctrine first adverted to would have held the city absolved from liability simply because the act was unlawful in that the charter did not give authority to the city to do the act complained of.²

§ 169. *Rule of Respondeat Superior*.—It may be observed, says Dillon,³ that when it is sought to render a municipal corporation liable for the acts of servants or agents, a cardinal inquiry is whether they are the servants or agents of the corporation. If the corporation appoint or elect them, can control them in the discharge of their duties, can continue or remove them, can hold them responsible for the manner in which they discharge their trust, and if those duties relate to the exercise of corporate powers, and are for the peculiar benefit of the corporation in its local or special interests, they may justly be regarded as its agents or servants and the maxim of *respondeat superior* applies. But if, on the other hand, they are elected or appointed by the corporation in observance to the statute, to perform a public service, not peculiarly local or corporate, but because this mode of selection has been deemed expedient by the legislature in the distribution of the powers of government, if they are independent of the corporation as to the terms of their office and the manner of discharging their duties, they are not to be regarded as the servants or agents of the corporation, for whose acts or negligence it is impliedly liable, but as public or state officers with such powers and duties as the statute confers upon them, and the doctrine of *respondeat superior* is not applicable. It will thus be seen, on general principles, it is necessary, in order to make a municipal corporation impliedly liable on the maxim of *respondeat superior* for the wrongful act or neglect of an officer, that it be shown that the officer was its officer, either generally or as respects the particular wrong complained of, and not an independent public officer; and also that the wrong was done by such officer while in the legitimate exercise of some duty of a corporate nature which was devolved on him by law or by the direction or authority of the corporation.

¹ Ashley v. Port Huron, 35 Mich. 296, 24 A. R. 552, citing Pumpelly v. Green Bay Co., 13 Wall. 166.

² See Brown v. Girardeau, 90 Mo. 377, 59 A. R. 28; Seele v. Deering, 79 Me. 343, 1 A. S. R. 314, 10 Atl. 45.

³ Mun. Corp. 974.

§ 170. **Same Subject.** — In a case already quoted from,¹ it has been said in further elucidation of this principle that there are two kinds of duties imposed upon a municipal corporation, in respect to which there is a clear distinction; one is imposed for governmental purposes, and is discharged in the interests of the public; and the other arises from the grant of some special power in the exercise of which the municipality acts as an individual. And it is elsewhere said that a distinction is made where the act is done in the promotion of the interest of the city in its special corporate rights, and when done in the interest of the public. Where a city has special powers granted by a charter, other than those concerning the public good and government of its citizens so that its officers' acts thereunder are the acts of agents and not of public officers, the city may become liable; but not where the act is that of an officer in enforcing ordinances of social government, or a general law of the land.²

§ 171. **Same Subject; When City Liable for Acts of Officers.** — In other words, in one instance the act is by a person deemed to be a public officer and, though selected and paid by the municipality, his duty is to preserve the peace, protect the persons and property of the citizens, in which instance he is held to be a state officer for whose acts the municipality is not liable; on the other hand, the act is that of a person who also may be an officer but whose duty it is to exercise his power for the improvement of the territory within the municipality and its adaptation to the purposes of residence and business.³ As illustrative of the first instance, a case was decided by the Texas Supreme Court, wherein a city had been sued by one who had been injured by a policeman discharging his gun at a dog, the officer attempting to enforce an ordinance directing the killing of dogs by a policeman. In holding against the plaintiff, the court said: "The enactment of the ordinance referred to in the petition was an exercise by the city of its police power. Its purpose was to secure the safety, health and welfare of the public. The man whose act was complained of was not, therefore, a mere servant or employee, though the petition so denominates him. He occupied the attitude of a policeman en-

¹ *O'Rourke v. Sioux Falls*, 4 S. D. 47, 46 A. S. R. 760, 19 L. R. A. 789; and supporting the same doctrine, see the following cases: *Franks v. Holly Grove*, 93 Ark. 250, 124 S. W. 514, 137 A. S. R. 86; *Gregg v. Hatcher*, 94 Ark. 54, 125 S. W. 1007, 27 L. R. A. (N. S.) 138, 21 Ann. Cas. 982; *Addington v. Littleton*, 50 Col. 623, 115 Pac. 896, 34 L. R. A. (N. S.) 1012, Ann. Cas. 1912C, 753; *Scott v. Tampa*, 62 Fla. 275, 55 So. 983; *Clarke v. Chicago*, 159 Ill. App. 20; *Hershberg v. Barbourville*, 142 Ky. 60, 133 S. W. 985, Ann. Cas. 1912D, 189, 34 L. R. A. (N. S.) 141; *Hathaway v. Everett*, 205 Mass. 246, 91 N. E. 296, 137 A. S. R. 436; *Lawton v. Harkins*, — (Okla.) —, 126 Pac. 727.

² *Rusher v. Dallas*, 83 Tex. 151.

³ *Western College v. Cleveland*, 12 Ohio St. 377.

gaged in the enforcement of an ordinance of the city. In such case, the maxim *respondeat superior* does not apply. Where a city acts as the agent of the state, it becomes the representative of sovereignty. It is not acting in the management of its private or corporate concerns, but in the interest of the public, and as the guardian of the health, peace, convenience and welfare of the public. Under such circumstances it is not liable for the acts of its officers or employees engaged in the execution of its ordinances.”¹

§ 172. **Same Subject.** — And as illustrative of the rule of liability of a municipality, a case arose in Missouri wherein was also involved the act of a policeman, showing that for one wrongful act of an officer, a municipality may be liable, while for another wrongful act of the same officer it will be absolved from liability. In this case the policeman had opened the trap doors covering a cellar-way opening from the sidewalk into a building occupied by the police commissioners as a police station. The plaintiff fell against these doors and was injured. The court in its decision states the general rule that a municipal corporation is not liable in damages for the wrongful or negligent acts of its police or other officers in the execution of powers conferred upon the corporation or officers for the public good and not for private corporate advantage, unless made liable by statute law, expressly or by implication. Yet the court held the defendant liable on the ground that in doing the particular act complained of the policeman was the agent of the city and not a public officer, and since it was the duty of the city to keep its streets and sidewalks in good condition for travelers to safely pass thereon, the act of the policeman was the act of the city for which it was liable.²

§ 173. **Where City Manages Property for Profit.** — So, it was held that a city is liable for the negligent management of property held by it for gain or profit, either wholly or partial, as where some portion of its municipal building is rented out, and a person is injured through negligence of parties employed by the city to repair the part so rented.³ It would have been otherwise had the city derived no compensation for the use of such building,⁴ although in a case where the city had undertaken gratuitously to care for its

¹ *Whitfield v. Paris*, 84 Tex. 431, 19 S. W. 566, 31 A. S. R. 69, 15 L. R. A. 783, citing, among others, *Culver v. Streator*, 130 Ill. 238, 22 N. E. 810, 6 L. R. A. 270; *Keller v. Corpus Christi*, 50 Tex. 614, 32 A. R. 613; 2 *Dillon, Mun. Corp.* 975.

² *Carrington v. St. Louis*, 89 Mo. 208, 58 A. S. R. 108; and see, also, *Rehberg v. Mayor*, 91 N. Y. 137, 43 A. R. 657.

³ *Oliver v. Worcester*, 102 Mass. 499, 3 A. R. 485; *Worden v. New Bedford*, 131 Mass. 24, 41 A. R. 185.

⁴ *Larrabee v. Peabody*, 128 Mass. 561.

shade trees, it was held liable to one who was injured by the falling of a limb negligently left hanging on a tree; it being held that the duty thus undertaken was private and ministerial and not strictly governmental.¹ A case arose in Massachusetts wherein a town maintained a farm for its paupers, and from the surplus products of the farm boarded paupers from other towns for pay and boarded persons working on its highways. An employee of the farm was directed by the overseer to drive to the town and haul back a load of manure. On the return trip the team driven by the employee ran into a blind man who was crossing the street, and injured him. In a suit against the town for damages for the injury, the court held it liable on the ground that it was engaged in conducting a farm partly for profit, and the employee at the time of the injury was engaged in furthering its interests in such business.²

§ 174. **Liability of City for Personal Injuries.** — As opposed to the doctrine of the case of *Carrington v. St. Louis*,³ the California courts have held that a municipal corporation is not liable for injuries received by a person who falls into a sewer which is in process of construction by the municipal authorities and is by them left unguarded, in the absence of any statutory provision making it liable for the neglect of its officers.⁴ From this doctrine, Works, J. and Beatty, Ch. J. dissented and filed a dissenting opinion with more reason and authority in support of their views.⁵

§ 175. **Negligent Performance of Ministerial Duties.** — In this connection, the Indiana court has said: A recovery can be had against a municipal corporation only where it negligently performs, or negligently fails to perform, a duty in its nature ministerial, and then only in cases where the ministerial duty is imposed by law. There must, in every case, be a duty, since where there is no duty there can be no negligence. It is, indeed, impossible to conceive a case where negligence can exist independent of duty.⁶ So, it was held that a village is not liable for the acts of its trustees in destroying property to prevent an imminent public injury, as such trustees were not the agents of the town within the principle of *respondeat superior*.⁷

§ 176. **Ratification of Wrongful Act of Officers.** — It has been

¹ *Jones v. New Haven*, 34 Conn. 1.

² *Neff v. Wellesley*, 148 Mass. 487, 20 N. E. 111, 2 L. R. A. 500.

³ *Supra*, § 172.

⁴ *Chope v. Eureka*, 78 Cal. 588, 12 A. S. R. 113, 4 L. R. A. 325.

⁵ See 2 *Dillon, Mun. Corp.*, 3d ed., 1024, and numerous authorities cited.

⁶ *City of Anderson v. East*, 117 Ind. 126, 19 N. E. 726, 10 A. S. R. 35, 2 L. R. A. 712.

⁷ *Aitken v. Wells River*, 70 Vt. 308, 40 Atl. 829, 67 A. S. R. 672, 41 L. R. A. 566; and see *Culver v. Streator*, 130 Ill. 238, 22 N. E. 810, 6 L. R. A. 270.

held that it is not within the power of a municipal corporation to ratify the wrongful or unlawful act of an officer so as to become liable. For it is said, "A city has no power to authorize a public officer to commit an unlawful act, and what it cannot do directly it cannot do indirectly by ratification."¹ This doctrine has been denied, however, and the municipality held liable through ratification.²

§ 177. **Conversion in General.** — The principles hereinbefore adverted to as applicable to the liability of municipalities for torts in general apply, of course, to instances where the corporation is alleged to have committed a conversion of the claimant's property. And here, as there, the controlling question is whether the officers or agents whose acts are complained of were discharging their duties for the sole benefit and advantage of the municipality, or for the public welfare. It is a general rule that the corporation is not responsible for the unauthorized and unlawful acts of its officers, though done *colore officii*. It must further appear that they were expressly authorized to do the acts by the city government, or that they were *bona fide* in pursuance of a general authority to act for the city on the subject to which they relate; or that, in either case, the act was adopted and ratified by the corporation. But there is a large class of cases in which the rights of both the public and of individuals may be deeply involved, in which it cannot be known, at the time the act is done, whether it is lawful or not. The event of a legal inquiry in a court of justice may show that it was unlawful; still if it was not known and understood to be unlawful at the time; if it was an act done by the officers having competent authority, either by express vote of the city government or by the nature of the duties and functions with which they are charged by their offices, to act upon the general subject-matter; and especially if the act was done with an honest view to obtain for the public some lawful benefit or advantage — reason and justice obviously require that the city in its corporate capacity should be liable to make good the damages sustained by individuals in consequence of the acts thus done.³

§ 178. **Whether Municipal Corporation Liable in Trover.** — Instances in which it has been sought to hold municipalities liable for conversion of property are few. And it has been said that the absence

¹ *Calwell v. City of Boone*, 51 Ia. 687, 2 N. W. 614, 33 A. R. 154; *Burch v. Hardwick*, 30 Gratt. (Va.) 24, 32 A. R. 640; *Peters v. Lindsborg*, 40 Kan. 654, 20 Pac. 490.

² *Dillon, Mun. Corp.*, 972, citing *Thayer v. Boston*, 19 Pick. 511, 31 A. D. 157; *McGary v. Lafayette*, 4 La. Ann. 440.

³ *Thayer v. Boston*, 19 Pick. 511, 31 A. D. 157; approved in *Hurley v. Texas*, 20 Wis. 634; *Hamilton v. Fond Du Lac*, 40 Wis. 47.

of such cases raises a very strong presumption that the bar everywhere entertains the view that such action cannot be maintained.¹ But there are instances where such actions have been sustained, although in the majority of such reported cases the municipality has been absolved from liability. No general rule has been formulated by which every such case can be judged, and it seems that all the courts can safely do is to determine each case as it arises upon the facts as developed.

§ 179. **Illustrations of Conversion.**—Thus, action was brought against the city of Minneapolis to recover the value of stone removed by it, or under its direction, from a street of the city. The evidence showed that the city, acting within its general power, made a contract with certain parties to grade the street, in which, among other things, it was provided that, in consideration of their grading the street, the contractors were to receive and to be permitted to quarry, take away, sell or use as their own, all the rock in this part of the street, and that, in pursuance of and under this contract they took out and disposed of the stone in question. The appellate court held, under such evidence, that the contractors were the agents of the city and the city was responsible for their acts.² But where the property of a plaintiff had been by mistake seized and sold by the treasurer of a city upon its tax warrant against the goods of another, the city was released in an action of trover on the ground that its officer was performing a public, as distinguished from a municipal, act.³ A contrary doctrine was held where an officer of a municipality seized and sold property to pay a void special assessment for benefits in opening a street.⁴

§ 180. **Abatement of Nuisances.**—The extent of municipal authority over nuisances is measured by the terms in which such authority is conferred. The power to do all acts necessary to preserve the health and promote the welfare of its inhabitants and to insure their safety—both in person and property—is broad enough to authorize a municipality to pass such ordinances as will effectually suppress and destroy that which is in its intrinsic nature a nuisance. In the abatement of nuisances the status of person and property of an individual must necessarily be subsidiary and secondary to the weal of the public, and much must be intrusted to the discretion of municipal officers, whose discretionary action will not be subjected

¹ *Wallace v. City of Menasha*, 48 Wis. 79, 4 N. W. 101, 33 A. R. 805.

² *Rich v. City of Minneapolis*, 37 Minn. 423, 35 N. W. 2, 5 A. S. R. 861.

³ *Wallace v. Menasha*, 48 Wis. 79, 4 N. W. 101, 33 A. R. 804; see, however, *Squiers v. Neenah*, 24 Wis. 588.

⁴ *Durkee v. Kenosha*, 59 Wis. 123, 17 N. W. 677.

to judicial interference unless so clearly oppressive and beyond the officer's authority as conferred by law as to be unreasonable and subversive of undoubted rights of an individual. Yet broad as the power is that enables municipalities to declare what shall constitute a nuisance, such power cannot be availed of to declare that a nuisance which, in its nature, is not such, or which is not injurious to health or property. In this connection, the Supreme Court of the United States has used this language: "But the mere declaration by the city council that a certain structure was an encroachment or obstruction did not make it such, nor could such declaration make it a nuisance unless it in fact had that character. It is a doctrine not to be tolerated in this country that a municipal corporation, without any general law either of the city or of the state within which a given structure can be shown to be a nuisance, can, by the mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all property in the city, at the uncontrolled will of the temporary local authorities."¹

§ 181. **Same Subject.** — In the adjudications wherein the question has been raised as to the liability of a municipality for damages caused by the destruction of property claimed to have been a nuisance, the form of the action has not always, nor even generally, been trover for the conversion of the property, but the principles involved are analogous to the principles of conversion, and in most instances trover would have been a proper remedy to test such municipal liability; and in the subsequent discussion of this subject the principles will be kept in mind without reference to whether the action was in form in trover, trespass or otherwise. For it is said that a party whose property is threatened with destruction, or actually destroyed as a nuisance may have his action in equity to restrain the destruction if the case be one where a court of equity, under equitable rules, has jurisdiction; or he may bring a common law action against all the persons engaged in the abatement of the alleged nuisance to recover his damages.² Thus, an action was brought to recover damages for the tearing down and removal of plaintiff's barn which had been left unoccupied and had been resorted to by various persons as a "sink." The town council declared it a nuisance and ordered its sale and removal. In reversing the lower court and sustaining plaintiff's right to damages the appellate court said: "The building in which particular trades are carried on, or

¹ *Yates v. Milwaukee*, 10 Wall. 497.

² *People v. Board of Health*, 140 N. Y. 1, 35 N. E. 320, 37 A. S. R. 522, 23 L. R. A. 481.

houses which may be kept in a disorderly manner, or used for unlawful purposes, are not *per se* nuisances; but it is the abuse of them only which constitutes the nuisance. . . . If the common council may make such an ordinance in respect to the comparatively useless stable of the plaintiff, why may not a like one be executed on the most elegant and costly edifice in the town, provided it should be used for some vicious or profligate purpose, and that too without the knowledge or consent of the owner? In the case before us the nuisance was not caused by the erection itself, but by the persons who resorted there, and the municipal authorities are armed with sufficient power to suppress the nuisance without resorting to the demolition of the building.”¹

§ 182. **Same Subject; What are Nuisances.** — Cooley says that “Whether any particular thing or act is or is not permitted by the law of the state must always be a judicial question, and therefore the question what is and what is not a public nuisance must be judicial, and it is not competent to delegate it to local legislative or administrative boards. The local declaration that a nuisance exists is therefore not conclusive, and the party concerned may contest the fact in the courts.”² So, the result of the authorities is that whoever abates an alleged nuisance and thus destroys or injures private property, or interferes with private rights, whether he be a public officer or private person, unless he acts under the judgment or order of a court having jurisdiction, does it at his peril and when his act is challenged through the regular judicial tribunals it must appear that the thing abated was in fact a nuisance. This rule has the sanction of public policy and is founded upon fundamental constitutional principles.³ And where the public authorities abate a nuisance under authority of a city ordinance, they are subject to the same perils and liabilities as an individual if the thing abated is not in fact a nuisance. It would indeed be a dangerous power to repose in municipal corporations to permit them to declare by ordinance or otherwise anything a nuisance which the caprice or interests of those having control of its government might see fit to outlaw without being responsible for all the consequences; and even if such power is expressly given by the legislature it is wholly inoperative and void unless the thing is in fact a nuisance or was created or erected after the passage of the ordinance and in defiance of it.⁴

¹ *Miller v. Burch*, 32 Tex. 208, 5 A. R. 242.

² *Const. Limitations*, (5th ed.) 722; see, also, *Hutton v. Camden*, 29 N. J. L. 122, 23 A. R. 203; *Lawton v. Steele*, 119 N. Y. 226, 23 N. E. 878, 16 A. S. R. 813.

³ *People v. Board of Health*, *supra*, § 178.

⁴ *Wood's Law of Nuisances*, sec. 740.

§ 183. **Same Subject.**—Having thus outlined the basic principles governing and limiting the power of municipalities in declaring and abating nuisances, I will notice a few cases where these principles have been applied. Thus, under the limitation that a city cannot declare that a nuisance which is not such in fact, an ordinance declaring picnics and public dances a nuisance was held void.¹ And where a railway company had laid its track upon the streets of a city in good faith and under chartered rights, the city had no right to declare it a public nuisance simply because the kind of rail used was not for the best interests of the city and laid in violation of an ordinance, and proceed to abate it by force. By so doing, they were held to be trespassers and rioters, liable civilly and criminally.² A house was ordered removed by the mayor of a city, the house being composed wholly of combustible material and insufficiently provided with chimneys and other protection against fires, and was used constantly night and day, by drunken and disorderly persons so that lives, health and property of the citizens were endangered. In a suit by the owner for the value of the property thus destroyed, judgment for the defendant was sustained, it having been shown that the property was in fact a nuisance.³

§ 184. **Same Subject.**—In an action against a city for the value of a feather bed, pillows and mattress destroyed by the sanitary inspector of the city, the action was dismissed by the court, it having been shown that such property was dangerous to the lives and health of the citizens of the community.⁴ The court took occasion to remark: "Unless the property is first condemned as a nuisance by appropriate proceedings, its destruction will be at the peril of the municipal authorities, and when sued for its value, the burden is upon them of showing that it was in fact a nuisance and that its destruction was really necessary to the public health and safety." Where the fact of nuisance is clear, the city is then under the obligation to exercise the power of abatement in a reasonable manner so as to do the least injury to private rights, and if it exercises the power of abatement in an unreasonable, careless or negligent manner so as to produce unnecessary damage, it will be liable for the damages caused by such negligence.⁵ Recovery has been allowed in some

¹ *Village of Des Plaines v. Poyer*, 123 Ill. 348, 14 N. E. 677, 5 A. S. R. 524.

² *Easton, etc. Ry. v. Easton*, 133 Pa. St. 505, 19 Atl. 486, 19 A. S. R. 658; *Tissot v. Tel. Co.*, 39 La. Ann. 996, 4 A. S. R. 248.

³ *Fields v. Stockley*, 99 Pa. St. 306, 44 A. R. 109.

⁴ *Mayor of Savannah v. Mulligan*, 95 Ga. 323, 22 S. E. 621, 51 A. S. R. 86; *Thielan v. Porter*, 14 Lea 622, 52 A. R. 173; *Teass v. St. Albans*, 38 W. Va. 1, 19 L. R. A. 802.

⁵ *Orlando v. Pragg*, 31 Fla. 111, 12 So. 368, 34 A. S. R. 17, 19 L. R. A. 196, citing *Field, Damages*, sec. 80; *Chicago v. Langlass*, 52 Ill. 256, 4 A. R. 603; *Schumacher v. St. Louis*, 3 Mo. App. 297; see *Wheeler v. Aberdeen*, 45 Wash. 63, 87 Pac. 1061.

instances for the destruction of property as a nuisance where, in fact, the nuisance consisted in the use to which the property was put, and not the property itself, such as a building used as a house of ill-fame.¹

§ 185. **Removal of Structures to Prevent Fire.** — The rule for determination of the liability of a municipal corporation where its officers destroy or remove buildings or other structures for the purpose of preventing a conflagration is based upon the maxim that a private mischief is to be endured rather than a public inconvenience. Under such rule, unless modified by statute, a city is not liable for such removal or destruction if it was necessary for the proper protection of other property. But the ground of exemption from liability in such cases is that of necessity and if property be so destroyed without any apparent or reasonable necessity, the doers of the act will be held responsible.² But when the necessity, or apparent necessity, exists liability does not attach. As Lord Coke says: "For the commonwealth, a man shall suffer damage; as for the saving of a city or town, a house shall be plucked down if the next be on fire. This every man may do without being liable to an action."³ So, therefore, at common law, the right and the justification are found in the same imperative necessity.

§ 186. **Same Subject; Whether Exercise of Eminent Domain.** — In many cases of action against a municipality for the value of property destroyed to arrest or prevent a conflagration, it has been sought to have the liability imposed under a claim that in such case the right of eminent domain had been exercised. But such contention has almost uniformly been denied by the courts. And the doctrine has been announced that the destruction of property under such circumstances cannot be considered as a taking of private property for public use within the meaning of the constitutional clause which prohibits such taking without just compensation. In one action for the value of property so destroyed, and where the above theory of liability was advanced by the plaintiff, the court said: "I think the destruction of the property in question does not come under the right of eminent domain, but under the right of necessity of self-preservation. The right of eminent domain is a public right; it arises from the laws of society, and is vested in the state or its grantee, acting under the right and power of the state, and is the right to take

¹ See *Sings v. Joliet*, 237 Ill. 300, 86 N. E. 663, 127 A. S. R. 323, 22 L. R. A. (N. S.) 1128; *Lowry v. Rainwater*, 70 Mo. 152, 35 A. R. 420.

² *McDonald v. Red Wing*, 13 Minn. 38; *Mayor of N. Y. v. Lord*, 18 Wend. 126, 17 *id.* 285.

³ *Mouse's Case*, 12 Coke, 63.

or destroy private property for the use or benefit of the state, or those acting under and for it. The right of necessity arises under the law of nature, is older than the laws of society or of society itself. It is the right of self-defense, of self-preservation, whether applied to person or property. It is a private right vested in every individual, and with which the right of the state or of state necessity has nothing to do. Of the right of eminent domain, constitutions take cognizance and say that private property shall not be taken without just compensation, because it is a public right belonging to the state; but of the right of necessity, constitutions take no further notice than they do with any other private right, all being left under the regulation of the law and the legislature. A statute is passed to take the land or building or property of an individual for a fortification, a lighthouse, or a railroad; this comes under the right of eminent domain, and the constitution steps in and requires payment. A right of self-defense, of self-preservation, without regard to the lives or property of others, exists by necessity in every individual placed in certain situations at sea or on land, in the country or in a city; and if the legislature think proper to pass a statute to regulate a portion of that right in a particular city, and instead of leaving its exercise to the blind action of all, make it the duty of certain officers to do the act, does this convert what was before a mere right of necessity in individuals into a public right of eminent domain? If it does, I am at a loss to understand the transmutation."¹

§ 187. **Same Subject.** — In another case where the eminent domain theory was relied upon, it was said by the court: "There is, however, a distinction between the exercise of the right of eminent domain, and that of a police regulation to meet an impending peril, by the destruction of an adjacent building to prevent the spread of fire. The one can await the forms and tardiness of the law; the other is governed by a necessity which knows no law."² Practically the same expression was used by the Vermont court where it was said: "The destruction of property to avert an imminent public injury is not a taking for a public use, and is, in no legal sense, an exercise of the right of eminent domain. The former is an exercise of the police power, and the latter stands on constitutional grounds."³

§ 188. **Same Subject.** — So far as my search has disclosed, there

¹ *Am. Print Works v. Lawrence*, 23 N. J. L. 590, 57 A. D. 420.

² *Keller v. Corpus Christi*, 50 Tex. 614, 32 A. R. 613. See to the same effect *Russell v. Mayor*, 2 Denio 461; *Randolph on Eminent Domain*, secs. 8 and 9.

³ *Aitken v. Wells River*, 70 Vt. 308, 40 Atl. 829, 67 A. S. R. 672, 41 L. R. A. 566; *Tiedman, Mun. Corp.* 335; *Field v. Des Moines*, 39 Ia. 575, 18 A. R. 46; *Suroco v. Geary*, 3 Cal. 69.

is but one adjudication contrary to the foregoing doctrine. That is the Georgia case of *Bishop v. Macon*,¹ where the city was held liable for the value of a building destroyed by its officers for protection against fire. Apparently, this case was decided according to the supposed doctrine of *Mayor of N. Y. v. Lord*,² which allowed damages to the claimant. But the latter case was decided strictly in pursuance of a statute allowing such compensation. In the event of such a statute, compensation may be awarded as hereinafter shown.³

§ 189. Same Subject; Where Statute Allows Compensation.—The common-law exemption of municipalities from liability for the value of buildings destroyed to arrest the spread of fire may be, and in many states has been, displaced by statutory provision allowing compensation for such buildings and under certain circumstances. Even in such cases, to enforce the liability the facts must come clearly within the statute. As was said in a Massachusetts case: "In order to charge the town, the remedy given by statute only, the case must be clearly within the statute. Independently of the statute, the pulling down of a building in a city or compact town, in time of fire, is justified upon the great doctrine of public safety. But if there be no necessity (for tearing down such building) then the individuals who do the act shall be responsible. This is the more reasonable, as the law has vested an authority in the proper officers to judge of that necessity. But the town is responsible by force of the statute only, and such responsibility is confined to the cases specially contemplated."⁴

§ 190. Same Subject; Law of Necessity.—Such statutes are founded upon, and are mere regulations of the common-law right of any person to destroy property in the event of immediate and overwhelming necessity, and they are regarded as giving as a matter of bounty that which without them could not be legally claimed. Accordingly, such statutes will be liberally applied, yet they will not be unduly stretched to enforce cases not fairly coming within their purview. Thus, the United States court, following the Massachusetts statute and an ordinance of the city of Boston based upon it and which provided that owners of buildings destroyed in order to prevent the spread of fire should be compensated by the city if the

¹ 7 Ga. 200.

² 18 Wend. 126.

³ As opposing the Georgia case, see *White v. Charleston*, 2 Hill (S. C.) 571; *Weightman v. Washington*, 1 Black. (U. S.) 39; *Brinkmeyer v. Evansville*, 29 Ind. 187; *Ruggles v. Nantucket*, 11 Cush. 433; *Davison v. Walla Walla*, 52 Wash. 453, 100 Pac. 981, 132 A. S. R. 983, 21 L. R. A. (N. S.) 454; see, however, *Mithroff v. Carrollton*, 12 La. Ann. 185.

⁴ *Taylor v. Plymouth*, 8 Metc. (Mass.) 462; see *Dawson v. Kultner*, 48 Ga. 133; *Frank v. Atlanta*, 72 Ga. 428; *Ruggles v. Nantucket*, 11 Cush. 433.

destruction had been on the order of three engineers, held the plaintiff could not recover since he failed to show that the order had been given in the manner pointed out by the statute.¹

§ 191. **Same Subject; Where Building would have Burned at All Events.** — Even under a statute it has been held that an owner of a building could not recover its value if, at the time of its destruction, it was on fire and must eventually have burned.²

11. PARTNERS

§ 192. **Each Partner is Agent of Firm.** — It is a basic principle of the law of agency that the principal is liable civilly for the tortious act of his agent committed within the scope of his employment and in furtherance of the principal's business, not only when the principal has authorized or ratified the act, but even in cases where the principal knew nothing about it. This is so for the reason that the relation of trust and confidence exists between them, and the principal, by employing the agent, impliedly recommends to the world that the agent is competent and trustworthy, and such indorsement is held to be a guaranty to third parties that he is such. Each member of a partnership is an agent of the firm in the performance of acts touching the partnership business; and, applying the principle of agency above mentioned, each partner being the agent of the firm, the firm is liable for his torts committed within the scope of the agency on the principle of *respondet superior*.

§ 193. **Each Partner Liable for Torts of Firm.** — It is established by repeated decisions that a tort for which the partnership is liable imposes liability upon each member of the firm individually. Such liability is not dependent upon the personal wrong of the individual member of the partnership against which the liability is asserted. Such personal liability exists even if the wrong was committed by an employee. The test of liability is based upon a determination of the question whether the wrong was committed in behalf of and within the reasonable scope of the business of the partnership.³ It has been said that by forming the connection as partners, the members declare themselves to the world satisfied with the good faith and integrity of each other, and impliedly undertake to be responsible for what they shall respectively do within the scope of the partnership concerns.⁴

¹ Bowditch v. Boston, 101 U. S. 16, 25 L. Ed. 980.

² Taylor v. Plymouth, 8 Metc. (Mass.) 462.

³ Matter of Peck, 206 N. Y. 55, 99 N. E. 258, Ann. Cas. 1914A, 798.

⁴ Story on Partnership, sec. 108.

§ 194. **Firm Liable for Conversion by Partner.** — In consonance with the rule of agency and firm liability for torts of its members, a firm may be held liable in trover for a conversion of personalty by a partner. It is not necessary that all the partners should have personally engaged in the commission of the act to render the firm liable, for, as a matter of law, the act may be held the joint tort of the partners by implication of the consent of a member to the acts of his co-partner. And such consent may be inferred from acts constituting a ratification, or by his acceptance of the benefits derived therefrom. An assent by some of the partners to a conversion committed by another will render them joint tort-feasors with him and subject them and the firm to liability therefor the same as if they had originally authorized it. It has been said that partners disclaiming liability for an act of conversion committed by a co-partner must be shown to have repudiated the act of such co-partner; for a conversion committed by a partner of property connected with the business of the partnership is deemed to be the act of the firm, unless repudiated by the other partners.¹ The case referred to has been cited time and again as an authority on this point. And while it is there said in the concluding sentence of the opinion that the act of a member of a firm “being *prima facie* the act of his partner, was evidence of a joint conversion, subject, however, to be rebutted by proof, if such there were, that the latter had openly disclaimed the act at the time,” yet it is not thought that the court intended to infer that repudiation of the act would in all cases release the other partner of the firm. The test of firm liability, as above stated, is to determine whether the tort was committed by a partner in furtherance of the affairs of the firm and within the legitimate scope of its operations. Such being established, liability follows, however strenuously the other partners may protest their innocence; for the acts performed in the name of a partnership cannot ordinarily be considered apart from the persons composing it.

§ 195. **Liability of Partners is Joint and Several.** — The liability of partners for the tort of one member of the firm or for the tort of a servant, is as in all cases of torts, joint and several. This is not a violation of the rule that a partner is the agent of all and not of each, but rests on the usual doctrine of torts that joint principals are jointly and severally liable for torts. Hence, the action may be against all the partners or against one, or against some number less

¹ Nisbet v. Patton, 4 Rawle 120, 26 A. D. 122.

than all.¹ Partners may be sued in an action of trover, although there was no joint conversion in fact. A joint conversion may be implied in law by consent of a partner to the acts of his co-partner which amount to a conversion.²

§ 196. **Act of Partner in Scope of Firm Business.** — If the wrongful delivery of goods of a third person, while they are in the custody of a partnership, is an act done within the scope of the partnership business, it, though made by a single member of the firm without the knowledge or consent of the other members, renders all of the partners liable in trover for a conversion of the goods.³ One partner placed a claim for collection in the hands of a constable, and the property of a stranger to the writ was levied upon and sold by the constable in his efforts to make collection. Both partners were held answerable to the owner in trover for a conversion of the property where it appeared that the other partner was present at the sale, bid on the property, treated the sale as having been made under the process issued upon the claim due the firm, and received the proceeds of the sale.⁴ The treasurer of a city deposited the city funds in the name of a firm which was composed of himself and others, and drew the money out by firm checks; it was held that such an act constituted a conversion of the money and the firm was held liable, especially since it appeared that all the partners knew about the transaction.⁵ A refusal by one partner to deliver up goods which have been intrusted to his firm as bailees, is evidence of a conversion for which the firm is liable.⁶ So, it is held that two partners must be said to have acted for their joint benefit where one went to a distant place, took possession of a debtor's store in his absence and sold goods therefrom in order to collect a debt due from him, it appearing that the other partner remained at home and credited the amount received for the goods on the debtor's account, and later, upon the return and report of his partner, ratified and approved all that had been done by him. In another case,⁷ staves had been made at the direction of one of two partners from timber cut upon the plaintiff's land without his consent, and were converted by the partners to their own use; it

¹ Bates, Partnership, 471; and to the same effect, see Shumaker, Partnership, 115, Story, Partnership, secs. 108, 131; 30 Cyc. 566; 22 Am. & Eng. Enc. L. (2d ed.) 171; Collier, Partnership, (6th ed.) sec. 499; Lindley, Partnership, (5th ed.) 198; 283; Castle v. Bullard, 23 How. 172, 16 L. Ed. 424.

² Bane v. Detrick, 52 Ill. 20; Meyers v. Gilbert, 18 Ala. 467.

³ Hobbs v. Chicago Packing Co., 98 Ga. 576, 25 S. E. 584, 58 A. S. R. 320.

⁴ Loomis v. Barker, 69 Ill. 360.

⁵ Pundmann v. Shoenich, 144 Mo. 149, 45 S. W. 1112.

⁶ Holbrook v. Wight, 24 Wend. 169, 35 A. D. 607; Sturges v. Keith, 57 Ill. 455.

⁷ Bane v. Detrick, 52 Ill. 19.

was held that both were liable for the wrong where notice was given to one of them, although the other had no knowledge of it.¹

§ 197. **Illustrations of Conversion for which Firm Liable.** — The plaintiff, in an action of trover for the conversion of a quantity of shingles, had delivered the shingles to one Gilmore during the existence of a partnership between him and another. Subsequent to the dissolution of the partnership, the attorney for the plaintiff addressed a letter to the firm demanding possession of the shingles. Gilmore replied, denying that they ever had any shingles belonging to the plaintiff. The other partner, Pratt, knew nothing about the demand and refusal of possession. The court held that the demand upon the firm and the denial by Gilmore that they ever had the shingles constituted a conversion by Gilmore, but that the firm having been dissolved prior to the demand and refusal, Pratt, knowing nothing of the act constituting the conversion, was absolved from liability. The court in this case remarked: "This case does not raise the question whether a conversion by one partner, of goods consigned to the firm, is in law the tortious act of all the co-partners, or whether they are all chargeable in tort, upon evidence that a demand has been made upon one of them, sufficient to have charged him with a conversion of the property bailed to him for any purpose. The relation of co-partners did not exist between the defendants at the earliest period at which there is any evidence of a conversion, and no relation between them succeeded that of the co-partnership that could give to the acts and declarations of Gilmore the effect supposed. If he had any agency for his former partner, there is no evidence whatever that it extended as far as that."²

§ 198. **Same Subject.** — A constable seized property under a void attachment writ. Possession was taken by him at the instigation of a firm who were creditors of the owner of the property, and a sale thereof was had upon the order of one of the partners who refused to surrender the property upon the demand of the owner. The other member of the firm declined to have anything to do with the transaction, but referred the owner to his partner. Not only the constable, but the firm, were held liable for a conversion of the property, the partnership being held upon the principle that whatever one partner does in the collection of a firm debt is presumptively done with the sanction of the other members.³ Likewise, where a firm

¹ *Tucker v. Cole*, 54 Wis. 539, 11 N. W. 703; *Gerhardt v. Swaty*, 57 Wis. 24, 14 N. W. 851.

² *Pattee v. Gilmore, et al.*, 18 N. H. 460, 45 A. D. 385.

³ *Rolfe v. Dudley*, 58 Mich. 208, 24 N. W. 657; *Harvey v. McAdams*, 32 Mich. 472.

of attorneys also did a collection business, the remaining partner was held liable for a sum of money collected by his co-partner who had absconded with the amount.¹ This is a clear illustration of the doctrine that one member of a firm vouches for the honesty, integrity and competency of those with whom he is associated as a partner.

§ 199. **Same Subject.** — In one case where property had been wrongfully taken and sold by partners, it appeared that one of the members had settled with the owner for one half; and the court held that this was no defense to an action against the other member for the remainder.² Plaintiff's property, which was in the custody of another person, was attached in a case against yet another party. At the sale it was bought in by the custodian, by him sold to a member of the defendant firm and paid for out of firm funds, and resold by the firm. The partnership was held liable for a conversion.³ The same principle was announced in a Missouri case.⁴ And in New Hampshire, where it was said that any doubt existing as to the liability of partners on account of their non-concurrence in the act was removed by their application of the proceeds to the use of the firm.⁵

§ 200. **Conversion of Bailed Property.** — Where property has been bailed to a partnership, or one of its members acting for it, the same liability for its conversion is imposed upon the partnership as upon any other bailee. Thus, where a firm had hired property for its own use and one partner used it in a manner not stipulated for, the firm was held liable.⁶ Likewise, where a partner, through his negligence, lost a horse which he had borrowed to use in the firm business, a recovery was allowed against the firm.⁷ And where partners were engaged in the business of warehousemen, and one of them issued certificates showing the storing of grain with them, when in fact none had been stored, and the plaintiff had loaned money to the holder of one of such certificates as his security, it was held that the firm was liable to the plaintiff for a conversion for refusing to deliver the grain, the court saying that the firm was estopped to deny the existence of the grain.⁸ So, where one of two partners engaged in the commission business induced plaintiff to permit a sale

¹ *Dwight v. Simon*, 4 La. Ann. 490.

² *McCrillis v. Hawes*, 38 Me. 566.

³ *Fletcher v. Ingram*, 46 Wis. 191, 50 N. W. 424.

⁴ *Kuhn v. Weil*, 73 Mo. 213.

⁵ *Gurley v. Wood*, 16 N. H. 539; same principle adhered to in *Durant v. Rogers*, 71 Ill. 121, 87 Ill. 508; *McClure v. Hill*, 36 Ark. 268.

⁶ *Myers v. Gilbert*, 18 Ala. 467.

⁷ *Witcher v. Brewer*, 49 Ala. 119.

⁸ *Griswold v. Haven*, 25 N. Y. 295.

of goods to one whom such partner represented falsely to be solvent, both partners were held liable, the court refusing to take any notice as to whether the other partner knew about the transaction or not.¹

§ 201. **Misapplication of Property Intrusted to Partner.** — Pursuant to the foregoing adjudications, it is a principle of the law of partnerships that if the firm has charge of or obtains possession of the money or property of others, or, what is the same thing, if property is delivered to one partner as representative of the firm to dispose of it in a way that is in the apparent scope of the business, all the partners are liable for the misapplication or conversion by one partner to such uses as cause its loss to the owner.² Thus, if one member of a firm which is engaged in making sales to a railroad, the pay for which is received from the state, obtains money to which the firm is not entitled by duplicate bills and bogus accounts, the innocent partner is liable as well as the guilty.³ And where plaintiff had consigned to one of the defendants wheat to sell on commission, and subsequently such defendant formed a partnership with the other defendant and accounts were rendered in the firm name, in reliance upon which the plaintiff did not direct a sale for a period of several months at which time he first learned that the defendant to whom he had originally consigned the wheat had converted it to his own use prior to formation of the partnership, both partners were held liable for the conversion.⁴ So, where a firm had been employed to sell iron ore for the plaintiff, one partner, finding the market to be rising, procured a third person to purchase the iron for the benefit of such partner, reporting to the plaintiff that it was sold, which fraudulent conduct was unknown to the other partner. Yet both were held liable.⁵ In this case the principle of agency was applicable which would prohibit an agent from making a secret profit out of the subject-matter of the agency.

§ 202. **Tort of Partner Outside Scope of Firm Business.** — With the exception hereinafter noted, it is the rule that a tort committed by one partner will not bind the partnership or the other partners unless the tort was committed within the scope of the partnership business. The mere relation of partners does not make the conduct

¹ *Castle v. Bullard*, 23 How. 172. On the question of knowledge or lack of knowledge in this connection, Pollock in his *Digest of the Law of Partnership* says: "One can hardly see what knowledge or means of knowledge has to do with it, if covered by the scope of the business," art. 24.

² *Bates, Partnership*, 474; *Jackson v. Toodd*, 56 Ind. 406; *In re Ketchum*, 1 Fed. 815; *Fornes v. Wright*, 91 Ia. 392, 59 N. W. 51; *McGill v. McGill*, 2 Metc. (Ky.) 259.

³ *Alexander v. State*, 56 Ga. 478.

⁴ *Coleman v. Pearce*, 26 Minn. 123, 1 N. W. 846.

⁵ *Peckham Iron Co. v. Harper*, 41 Ohio St. 100.

of the individual imputable to the firm unless it was authorized by his co-partners. Hence, if a partner commit a tort, not as a partner but as an individual, in respect to a matter wholly outside the scope of the joint business, there is no liability against his associates in the partnership.¹ Thus, where a member of a firm purchased cotton which was liable for rent, the purchase being made for his own use, and he converted it, the other partners were held not liable, it appearing that they had nothing to do with the conversion and received none of the benefits.² And where plaintiff had delivered to a partner a power of attorney to transfer certain shares of stock, and the partner had afterward transferred them to his firm and, for the firm and in its name then re-transferred them to himself, it appearing that the other partners knew nothing about the transaction, they were absolved from liability.³ Likewise, the innocent partner was released in a case where the plaintiff, being indebted to the defendant firm, handed to one member a note for collection with instructions to either hand him the proceeds or apply it on the debt. Such partner failing to account for the proceeds, the firm was held not liable.⁴

§ 203. **Where Special Authority Given One Partner.** — A like immunity from liability obtains in favor of innocent partners and their firm in cases where property is in the firm's custody and the owner gives to one partner a special authority to act in regard to it, such power being exclusive to the particular member, and he using it to appropriate the property to his own use. The fact this connection with the firm gave him the opportunity to commit the wrong is not sufficient to fasten liability upon the firm or the other partners. Thus, a firm made a note payable to a company, and one of the partners forged the name of the company upon it to give the plaintiff title to sue; the partners not participating in this fraud were discharged.⁵

§ 204. **Same Subject; Where Firm Receives Benefit.** — The exemption above discussed in favor of partners where a tort has been committed by one in a transaction not connected with the partnership business does not obtain where the partnership has received the benefit resulting from the tort. This is the exception to the general rule that partners are liable for the torts of each other only when same are committed in connection with the business of the partner-

¹ Schwabacker v. Riddle, 84 Ill. 517; Stokes v. Burney, 3 Tex. Civ. App. 219, 22 S. W. 126.

² Stokes v. Burney, *supra*.

³ Adams v. Sturges, 55 Ill. 468.

⁴ Linn v. Ross, 16 N. J. L. 55.

⁵ Pierce v. Jackson, 6 Mass. 242.

ship. As where a partner obtains money by crime or fraud, or converts property and uses the funds derived therefrom for the firm, either by direct contribution or by paying its debts, where it is manifestly just that the defrauded person should be deemed a creditor of the firm, and not merely of the guilty partner. Liability in such cases has sometimes been put upon the ground of an implied ratification arising from receiving a benefit. But this ground is not the true one. Ratification never takes place without knowledge.¹ Yet if the partners not participating in the wrong had knowledge of it, acquiesced in it and received the proceeds derived from it, then liability would be thrown upon them.

§ 205. **Same Subject; Knowledge of Non-participating Partner Must be Shown.** — But it must be shown that the partner not participating in the commission of the wrong knew of it, approved it and received benefits from it, for such elements — when co-existing — constitute a ratification of the wrongful act. On the principle that a person does not make himself liable by ratifying an illegal act of another unless the act was done in his behalf or for his benefit, if a partner commit a tort outside the scope of the business and of no benefit to the firm or its interests, his co-partner's subsequent approval of it will not make him liable.²

12. CO-TENANTS

§ 206. **Liability of; In General.** — The early rule was that no action could be maintained by one co-tenant against another in instances where the latter had deprived the former of the enjoyment of the joint property. So many exceptions have been made to this rule, however, that the tables have been practically turned and now it has come to be recognized that a part owner of a chattel may be guilty of a conversion of the interest of his co-tenant, and upon principle the test by which to determine whether a conversion has occurred is the same as in cases between other parties. However, a joint tenant can maintain no action against his co-owner unless the latter has made some disposition of the property entirely inconsistent with the rights of the former. A conversion does not occur until these rights have been interfered with. The result of the common ownership is that each of the co-tenants is entitled to possession of the joint property, and neither can maintain an action against the other for retaining possession even though by so doing one of them is ex-

¹ Bates, Partnership, 478.

² Bates, Partnership, 469, citing *Grund v. Van Cleck*, 69 Ill. 478; *Rosekrans v. Barker*, 115 Ill. 331, 3 N. E. 93.

cluded from the possession entirely. This seems to be a rule uniformly applied, and the only remedy of the excluded party is by a bill in equity for a division of the property or for a sale of it and division of the proceeds.¹ Under the common law, there must be a destruction of the property, or something equivalent to it, such as a sale or other disposal which puts it beyond the power of the co-owner to assert any rights over it, before a conversion will be held to have occurred.²

§ 207. **One Claiming to be Sole Owner of Joint Property.** — But if possession and use of property by one co-owner are maintained under a claim by him that he is the sole owner, and that his co-tenant has no interest in it whatever, this has been held to be a conversion for which trover may be maintained.³ In other words, the possession and use must not be inconsistent with the right of a joint owner. If the facts show such an act or acts, in reference to the common property, as to induce the conclusion that the defendant has disregarded the rights of his co-tenant by a destruction of the property or by an appropriation of it to his own use, then a conversion is established for which an action of trover is a proper means of redress. The facts from which such destruction or appropriation may be presumed must be inconsistent with the obligations of the co-tenancy, otherwise no conversion is shown. The facts which are thus inconsistent, and are therefore sufficient to establish a conversion and to support an action of trover by the injured co-tenant against his companion, cannot be exactly specified, because upon this, as upon most other questions involving the exercise of human judgment, the conclusions maintained have not been entirely harmonious.⁴ But no co-tenant has the right to destroy the subject-matter of the joint ownership, or to put it to any use which must preclude all further enjoyment of it by his co-tenant or to mingle it with other property so that its identity is lost and cannot be restored, or to so injure or expose it to peril that it must become either lost or worthless, and therefore each of these acts, as well as some others to be hereinafter discussed, may be treated by him as a conversion because they are inconsistent with and destructive of his rights as a part-owner. I shall now attempt to show, by a classification of various decisions, the circumstances under which a co-tenant has been held for a conversion, and where he has been found guiltless of the charge.

¹ *Tyler v. Taylor*, 8 Barb. 585; *Roody v. Cox*, 29 Ga. 309; *Given v. Kelley*, 85 Pa. 309; *Bertrand v. Taylor*, 32 Ark. 470; *Weld v. Oliver*, 21 Pick. 562.

² *Williams v. Nolen*, 34 Ala. 169; *Ballou v. Hale*, 47 N. H. 347.

³ *Bray v. Bray*, 30 Mich. 479.

⁴ *Freeman, Co-Tenancy*, 307.

§ 208. **Sale of the Joint Property.** — There is some diversity of opinion among the courts as to whether a sale of the entire property of co-tenancy by one of the tenants in common will support an action of trover for a conversion by the one so selling. On the one hand, it is argued that as the sale by one tenant in common of his co-tenant's share, passes the interest of the vendor only, the interest of the other co-tenant still remains in common with the purchaser, and therefore there can be no conversion by the act of sale.¹ On the other hand, a great majority of the recent American cases hold that, as the assumption of authority over, and actual sale of the property by a stranger will constitute a conversion, so the assuming authority to sell, and actually making sale of the interest of another under a claim of title in the vendor, although he be part owner, may be taken to be a conversion, for which an action of trover will lie. It is true, such sale does not vest in the purchaser any greater interest than that of the party making the sale; and the co-tenant who is not consulted, may so consider it, and take the property when opportunity offers; but he may sue in trover for the conversion, and thereby vest in the purchaser the entire property.²

§ 209. **Same Subject.** — If a party claim the property in chattels as his own, or even assert the right of another over them, it is evidence of a conversion — and where a person's property is sold by one, whether for his own use or the use of another, it is a conversion, for it is a tortious act, and the gist of the action. He who sells his co-tenant's share of the property to a stranger who will hold against him has violated the relation he bore, and injured his companion as much perhaps as if he had destroyed the property. Why, then, should he not have a legal remedy against the wrong-doer instead of requiring him to look to the purchaser for his interest in the property, and he to the wrong-doer?³

§ 210. **Same Subject; Whether Sale Amounts to Destruction.** — Different arguments have been advanced as to the theory upon which a tenant should be held liable in trover for a conversion of the interest of his co-tenant where the former has sold the entire common property. It has been said that the foundation of the liability is that the sale of the entire property worked a destruction of the property in so far as the injured tenant's rights therein are concerned, and since there is no question among the courts but that a destruction of the

¹ *Mersereau v. Norton*, 15 Johns. 179.

² *Rains v. McNairy*, 4 Humph. 356, 40 A. D. 651, citing *White v. Osborn*, 21 Wend. 72; *Melville v. Brown*, 15 Mass. 82.

³ *Perminter v. Kelly*, 17 Ala. 718, 54 A. D. 177.

common property by one co-tenant renders him liable for a conversion thereof, it is held that this result necessarily follows a sale. "It is said in the decisions that a distinction has been attempted between the sale of a chattel and a tortious destruction, but that is a distinction not maintainable. There is unquestionably a difference in the meaning of the terms when defined, but their legal effect upon tenants in common is the same, and trover or trespass will lie for either, in favor of the party."¹

§ 211. **Same Subject.** — But the true theory, it seems to me, is that of appropriation of the property to the use of the guilty tenant or to the use of a third person. The rule that a co-tenant selling the whole of a chattel as his own and delivering possession thereof to the purchaser, is responsible to his co-tenant in an action of trover, is not enforced merely because it affords a penalty against him for violating the obligations of the joint ownership. It depends on principles which are equally applicable to ownership in common and ownership in severalty. Whoever assumes the right of ownership and the power of disposition over personal property and carries this assumed authority so far as to dispose of the thing as his own thereby *converts* it and makes himself liable to an action in trover. If instead of assuming authority over the whole, he assumes it over a part, then the conversion exists as to that part only. It is none the less a conversion of the *part* because he who converts may be the owner of another part or interest; and the law does not withhold its remedy merely because the conversion is an undivided interest instead of an entire interest. In some of the cases, by which a sale of the entire subject of the tenancy is declared a conversion it is justified upon the ground that such sale is a kind of destruction of the rights of the other co-tenant. But the rule does not rest on this ground. If it did so rest, it must necessarily fall for want of sufficient support. A sale by one co-tenant cannot of itself affect the title of the other. It neither destroys the latter's property nor any of his rights arising out of such property. It is a conversion not because of the destruction but of the appropriation of the property of another.²

§ 212. **Same Subject.** — Again it is said that a sale of the entire property amounts to a conversion because it shows a kind of dominion unjustifiable and inconsistent with the rights of the parties.³ But whatever theories may be advanced for the liability, the rule is ad-

¹ Warren v. Allen, 1 Pinney (Wis.) 479, 44 A. D. 406.

² Freeman, Co-Tenancy, 308, citing *id. al.* Wheeler v. Whalen, 33 Me. 349; Delaney v. Root, 99 Mass. 547, 97 A. D. 52.

³ Carr v. Dodge, 40 N. H. 408.

hered to by all the states of the Union, with the exception of two or three to be presently noted, that such a sale amounts to a conversion for which trover may be maintained against the guilty tenant. The rule has been applied under a multitude of varying circumstances, and I shall now attempt to show how such application has been made.

§ 213. **Same Subject; Sale of Crops.** — Where crops produced on land were to be divided equally between the landlord and the tenant, the relation of the parties was that of tenants in common, and where one sold the entire crop, it was held to be a conversion of the interest of the other for which the latter could maintain trover.¹ And where parties were tenants in common of a quantity of wheat by mixing it in a common bin, one of them who sold the whole of it was held liable in trover to the other.² In another case the plaintiff and his mother were tenants in common of certain property which they had inherited from plaintiff's father. Later the mother married the defendant who thereupon succeeded to her share of the property and consequently became a tenant in common with the plaintiff. Defendant sold or destroyed the property or refused to deliver it to plaintiff on demand and the action was thereupon brought by plaintiff for a conversion. The court, although remanding the case on a point of practice, said: "Tenants in common of a chattel have an equal right to the possession. The law will not afford an action to the one dispossessed because his right is not superior to that of the possessor. But tenants in common are not like partners. One of the latter may dispose of their joint chattels by virtue of an implied authority to sell, without being liable as for a tort; while the latter cannot dispose of them without violating the right of their co-tenant. For a sale, therefore, trover will lie by one tenant in common against another."³

§ 214. **Wrongful Purchase by Defendant.** — In another case it appeared that the plaintiff and another were the joint owners of a hogshead of rum and a pair of scale beams, which the sheriff seized and sold *in toto* to the defendant, by virtue of an execution against the other joint owner. The defendant sold the rum at retail to his customers; and in an action of trover brought against him for the goods by the other two owners, the judge instructed the jury that the retail of the rum by the defendant was in law a destruction, so as to enable the plaintiffs to maintain the action to this extent; and

¹ Neilson v. Slade, 49 Ala. 253.

² Nowlen v. Colt, 6 Hill (N. Y.) 462, 41 A. D. 756.

³ Hyde v. Stone, 9 Cow. 230, 18 A. D. 501, s. c. reported after re-trial, 7 Wend. 354; see Dyckman v. Valiente, 42 N. Y. 561; White v. Osborn, 21 Wend. 75.

his instructions were held correct. The appellate court based its opinion on the ground that the sale was a conversion of the property. But as in this case the property had been actually consumed by the vendee, beyond the power of recovery, it was to all intent an actual conversion and the general remark was wholly uncalled for by the case in judgment.¹ In another case where plaintiff and defendant had entered upon a joint venture for the curing and sale of skins, it was held that a sale by one of them did not amount to a conversion, but that if one denied the other any interest in the property and refused to account for the proceeds of the sale, but appropriated them to his own use, such would be a conversion for which trover could be maintained.²

§ 215. **Rule Denying Trover for a Sale.** — There are two or three states that have held out against the great weight of authority, and maintain that the mere sale by a co-tenant of a chattel owned in common is not a conversion as against his co-owner and, consequently, that trover cannot be sustained therefor. Some early Connecticut cases held to this doctrine.³ The principal case holding to this negative doctrine, and the one most frequently cited, is from the Vermont court, decided in 1834.⁴ In this case the defendant and another being tenants in common of the wool of certain sheep owned by them, the latter sold his interest to the plaintiff. The defendant knowing this, nevertheless sheared the sheep, and sold twenty-eight out of the sixty-eight pounds realized, and carried the balance to his house, refusing to deliver to the plaintiff his share, but claiming them as his own. It will be noted that in this case only a part of the property was sold. The court admits that it is in the minority by saying that from the authorities cited by plaintiff "it seems that the most they show as to a sale being a conversion, is that until lately, at least, strong doubts had existed whether the sale of the whole chattel owned in common, by one tenant is a conversion; but the weight of authorities now is that it is." It is further remarked, however, that "no intimation has been thrown out by any judge or elementary writer that the sale of less than the whole is such a conversion." The court also bases its holding of no conversion on the ground that the selling did not destroy the property. "Upon principle, it would seem to depend upon the kind of property and the use that the parties

¹ Comment of Greenleaf, "Evidence", note to art. 646 on case of *Wilson v. Reed*, 3 Johns. 175.

² *Green v. Edick*, 66 Barb. 567. It occurs to me that this was a partnership rather than a co-tenancy, and if so, trover could not be maintained.

³ *Oviatt v. Sage*, 7 Conn. 99.

⁴ *Tubbs v. Richardson*, 6 Vt. 442, 27 A. D. 570.

intend to make of it, whether a sale of the whole by one party would be lawful or not, independent of partners in trade. Take the case of two farmers owning a flock of sheep in common; when the wool is sheared, as there is no law to compel a division or partition where they do not agree, and its quantity as well as quality is to be regarded, it might be reasonable to hold it no tort if one sold the whole, and made himself accountable to his co-tenant, in account for money had and received. In the case of tenants in common of a horse or individual property, still greater difficulties might occur where one wished to keep and the other to sell. Yet there may be greater inconveniences to hold to the contrary; and we should probably yield to the authorities on this point; but to go farther without authority, or any stronger reason of sound policy than has yet appeared, would not be proper. Applying these principles to the facts in this case, there is no evidence of destruction; for aught appears, the whole of the wool yet remains wool; selling a part and carrying the remainder to defendant's house was no destruction of it. There was no sale save of twenty-eight pounds, which was less than half, and all the cases of sale go expressly on the ground of the sale of the whole, and there is no pretense that the defendant's possession was tortious, as the whole sheep were the defendant's property, were in his possession and sheared by his tenant, and the not delivering the wool on demand and claiming it as his own, is nowhere called a conversion."

§ 216. **Same Subject.** — Inasmuch as Vermont is, so far as my research has shown, the only state which has continued to squarely breast the current of authority on the point under discussion, I have quoted at length from this early case in order to follow up with later decisions of the same state showing that the doctrine became fixed in that state that a sale of the common property by one co-tenant did not work a conversion thereof. It will be noted that in the *Tubbs-Richardson* case the court frankly admitted that the vast weight of authority holds such act a conversion, and, with a sort of twelfth-juror tenacity, holds to the opposite doctrine while attempting to qualify such holding by noting that there had been a sale of only part of the property, that the property had never been destroyed, and that under different circumstances a sale of the entire property might amount to a conversion. The next time the question came before the court was in an indirect manner in an action of trespass.¹ Here, a further disinclination was manifested to hold such case a conversion.² In the next case, which was an action in trover, it was

¹ *Welch v. Clark*, 12 Vt. 681, 36 A. D. 368; approving *Tubbs v. Richardson*, *supra*.

² *Hurd v. Darling*, 14 Vt. 221.

said that nothing short of a destruction of the property would amount to a conversion, and the court said a sale "it would seem, does not amount to a conversion," citing the Tubbs-Richardson case.

§ 217. **Same Subject.** — The question of whether a sale of the entire property by one co-tenant amounted to a conversion finally came squarely before the court for a decision.¹ In this case the vendee of one of the co-tenants of a quantity of logs had sold them and refused to account to the other co-tenant, the latter thereupon bringing trover for the value of his share. "It seems to be conceded by the counsel," says the court, "and so are the authorities, that one tenant in common of personal property, may maintain trover against his co-tenant, for a destruction of the property. So the question to be determined in the present case is, Whether a sale of the chattel for this purpose, is equivalent to its destruction. The question upon which the case is to be determined, belongs to the class of technicalities; for if the facts exist which the plaintiff offered to prove, there is no doubt that the plaintiff is entitled to some sort of remedy; and the question is in relation to the form of the action. In other words, the question is whether the remedy shall be by action *ex delicto*, or *ex contractu*. And upon this point the authorities are to some extent conflicting; and the case like many others, must be settled by the weight and current of the authorities. . . . In determining the question one or two points here are worthy of consideration before proceeding further. We have already remarked that this action may be maintained for a destruction of the property by one tenant in common against his co-tenant; and those authorities which sustain the action, do so upon the notion that a sale is equivalent to a destruction. I think there is a difficulty in sustaining the action upon this ground. If the defendant had no right to sell this property, then his attempting to do so did not divest the plaintiff of his interest in it; and while the plaintiff had an interest in the property so that he could pursue it, I cannot see how it can be said that the property was destroyed. There can be no destruction of the property arising from the sale, only upon the supposition that the defendant was authorized to sell it; or, having sold it, that the plaintiff has ratified the sale; and, in either of these cases, it would not be pretended that the plaintiff could maintain trover; but the action should be in form *ex contractu*." Again, "When one tenant in common makes sale of the whole chattel, the other tenant has his election, either to disaffirm the sale and stand as co-tenant

¹ Sanborn v. Morrill, 15 Vt. 700, 40 A. D. 701.

with the purchaser, or to affirm the sale and call the seller to account for the proceeds. And when he ratifies the sale it ceases, of course, to be a tortious act." And the court further refuses to hold such sale a conversion on the doctrine of *stare decisis*, saying that it has no disposition to disturb the doctrine settled in the case of *Tubbs v. Richardson*. It is said that the only feature distinguishing the two cases was that in the *Tubbs-Richardson* case only a part of the common property was sold. "The right of action could not be made to depend upon the fact whether the whole or only a part, of the property was sold. If selling the whole would be unauthorized and tortious, so equally, in principle, would be the selling of a part." Therefore, from these arguments, the court concludes that a sale of the whole common property is not a conversion.¹ The error fallen into by the court, in my judgment, is in failing to see that the conversion in such case arises from the *appropriation* of the property to the benefit of the seller or a third person in a manner inconsistent with the rights of the other tenant.

§ 218. *Same Subject.*—The only other state leaning to this doctrine is North Carolina,² and there the decisions seem to be rather "betwixt and between," for it has been held that if one tenant in common take the property out of the state and sell it, the other tenant may treat it as a destruction; but a sale within the state is not sufficient. This is a holding hard to reconcile with the general rules of liability for torts. That the great weight of authority holds the sale under discussion a conversion, the cases cited in the notes will amply sustain.³

§ 219. *Conversion by Destruction.*—Whatever difference there may be among the courts over the question of liability of a tenant in common for a conversion by sale of the entire common property, they all agree that a destruction of the property by him works a conversion for which he will be liable in trover. Thus, one tenant's using up hay owned jointly by him and another, is a conversion, the property being entirely annihilated.⁴ But the courts do not require

¹ See the later cases of *Barton v. Burton*, 27 Vt. 93; *Lewis v. Clark*, 59 Vt. 363; *Bell v. Lyman*, 1 T. B. Mon. 29, 15 A. D. 83.

² *Pitt v. Petway*, 12 Ired. L. 73.

³ *Coursin's App.* 79 Pa. 229; *Dain v. Cowing*, 22 Me. 349; *Starnes v. Quinn*, 6 Ga. 87; *Sullivan v. Lawler*, 72 Ala. 76; *Perry v. Granger*, 21 Neb. 579, 33 N. W. 261; *Munford v. McKay*, 8 Wend. 444; *Le Barron v. Babcock*, 122 N. Y. 153, 25 N. E. 253, 9 L. R. A. 625; *Winner v. Penniman*, 35 Md. 165; *Person v. Wilson*, 25 Minn. 189; *Goell v. Morse*, 126 Mass. 480; *Yamhill B. Co. v. Newby*, 1 Ore. 173; *Rains v. McNairy*, 4 Humph. 359, 40 A. D. 657; *Leader v. Plante*, 95 Me. 343, 50 Atl. 53, 85 A. S. R. 418; *King v. Neel*, 98 Ga. 438, 58 A. S. R. 311; *Omaha, etc. Co. v. Tabor*, 13 Col. 41, 16 A. S. R. 185.

⁴ *Lewis v. Clark*, 59 Vt. 363.

that the property shall be physically destroyed, as in the law of conversion by a tenant in common the word destroy has a technical meaning. There may be such an invasion of the right of one co-tenant by another, or such an appropriation of the joint property of the co-tenancy by one of its members, that the rights of one of the part owners are in effect destroyed or set at naught, although the property out of which those rights arose may still continue in existence. In such cases, where the effect of the act of one tenant in common is practically a destruction of the rights of the other, the latter may resort to an action of trover with the same success as though his property had been annihilated.¹

§ 220. **Merely Retaining Possession, no Conversion.** — While it is the general rule that merely retaining exclusive possession of the common property by one tenant does not amount to a conversion, since either one is entitled to possession, yet it is evident that the possession or use of the property may become so exclusive or so arbitrary as to amount to a practical destruction of the property as to the co-owner or of his rights therein. When such fact exists, it amounts to a conversion for which the excluded party may maintain trover.² It has been held that the guilty tenant becomes liable as soon as he, being in possession, sets up a claim to the property, denying any interest of the co-tenant in and to same.³ Any disposition of the property by a joint owner, either for his own use or another's, which puts it out of his power to deliver it to his co-tenant, amounts to a practical destruction of the latter's interest therein and the latter may maintain trover.⁴ Where a landlord leased his farm on shares and the tenant planted and raised crops thereon which the landlord afterward harvested and retained possession of excluding the tenant from any right therein and refused to recognize such right, it was held that a conversion had occurred.⁵ Where one joint owner of a printing press took away certain essential parts together with several fonts of type so that the press could not be operated, it was held that there was such a destruction of the property as rendered him liable in trover to his co-tenant.⁶

§ 221. **Property held on Shares.** — In one case it appeared that the plaintiff, being the owner of a number of hogs, let them to defendant who agreed to fatten them on shares. When they were

¹ Freeman, Co-Tenancy, 313, citing *Delaney v. Root*, 99 Mass. 547, 97 A. D. 52.

² *Newby v. Harrell*, 99 N. C. 156, 5 S. E. 284, 6 A. S. R. 503.

³ *Roddy v. Cox*, 29 Ga. 309, 74 A. D. 64; *Grove v. Wise*, 39 Mich. 162.

⁴ *Webb v. Mann*, 3 Mich. 143.

⁵ *McClure v. Thorpe*, 68 Mich. 33, 35 N. W. 829.

⁶ *Needham v. Hill*, 127 Mass. 135.

fattened the defendant notified the plaintiff to attend a certain place where a division would be made. Plaintiff informed the defendant that he would not attend. Thereupon the defendant turned plaintiff's hogs loose in the street after making division of the bunch himself. Plaintiff sued in trover for a conversion. The court, in the course of its opinion, said: "The plaintiff delivered to the defendant twenty-seven hogs to be fattened on the shares. The plaintiff was, before the delivery, the sole owner. What were the rights of the parties after the delivery to the defendant? It seems to me that they were tenants in common of each and every hog. If the hogs were fattened, the parties were certainly tenants in common before the division was made. It was not competent for one tenant in common of two chattels, without the consent of the other tenant in common, to appropriate one chattel to himself and the other to his co-tenant. One may dispose of his share of the property held in common and the purchaser becomes a co-tenant with the other tenant in common. The turning the hogs out in the street, without any further account of them, is at least *prima facie* evidence of a destruction. And the plaintiff below was entitled to recover in trover. One tenant in common may maintain trover against his co-tenant where there is a destruction of the chattel."¹ "What constitutes a conversion, short of a sale, is not definitely settled. A total destruction of the property, or a conversion of the whole to his own use, or something equivalent, such as a total denial of his co-owner's interest in the property, coupled with a total exclusion from possession, will render the owner in possession liable to his co-owner."² The destruction of common property which will render one tenant in common liable to the other in trover means such dealing with it that it is no longer the thing held in common, but something else that cannot be used or possessed by the parties as before. Anything equivalent to destruction is sufficient as well as such a change that it is no longer the same thing, or a removal of it and placing it in such condition that the co-owner cannot avail himself of his rights because the property is out of his reach.³ These instances, I take it, are sufficient to show the unanimity with which the courts hold a destruction of the common property to be conversion of it.⁴

§ 222. **Removal of the Common Property.** — The authorities establish the rule that the mere removal of the joint property by one

¹ *Sheldon v. Skinner*, 4 Wend. 525, 21 A. D. 161; *Benedict v. Howard*, 31 Barb. 572.

² *Tuttle v. Campbell*, 74 Mich. 652, 42 N. W. 384, 16 A. S. R. 652.

³ *Strickland v. Parker*, 54 Me. 269.

⁴ See further *Balch v. Jones*, 61 Cal. 235; *Grim v. Wicker*, 80 N. C. 343; *Allen v. Harper*, 26 Ala. 689.

tenant in common is not sufficient to constitute a conversion by him and render him liable for the value thereof in an action of trover. This rule is consonant with the one permitting a co-tenant to maintain exclusive possession without thereby committing a conversion; and so long as the property remains in his possession, and is neither destroyed, lost, nor appropriated to his own use in utter defiance of the rights of his co-tenant, there can be no conversion.

§ 223. **Same Subject.** — It is said by an eminent authority that the general rule in regard to the effect of a removal of a chattel by one of the part owners seems to be this, that while the right to take the chattel can be successfully asserted by the part owner, he cannot sustain any action; but as soon as this right is extinguished his remedy is complete.¹ As an illustration of this idea, the author cites a case where there had been a removal of the property to some place unknown to one of the part owners, under such circumstances that afforded him no means of ascertaining where the chattel could be found, and it was said that such a removal was a destruction of the property sufficient to render the one so removing it liable for a conversion. But suppose the joint property is severed from the property in connection with which it has been used, and removed to a place known to the innocent tenant and in such a manner that he could yet reclaim the specific property? Has a conversion of the property occurred as against such innocent part owner? I think it has. As illustrative of this theory, the purchaser at execution sale of an undivided interest in a tract of land removed the superstructure of a marine railway located on the land consisting of wooden rails and sleepers, etc., and placed it upon another tract of land. The court held that the property removed constituted a part of the land and passed with it; but that the co-tenant of the purchaser might maintain trover against him for removing it.² This, it seems to me, is in accordance with the general rule that where one of the owners of an undivided interest in chattels exercises such dominion over the common property as is inconsistent with the rights of his co-owner, the latter may bring replevin for the specific property and recover damages for its detention, or may elect to sue for damages for the wrongful conversion and recover the value of the property.³

§ 224. **Same Subject; Chattels Attached to Realty.** — Where one tenant in common of machinery in the form of personal property removed it to his own land and buildings and attached it in such

¹ Freeman, Co-Tenancy, 317.

² Strickland v. Parker, 54 Me. 263.

³ Stephens v. Koonce, 103 N. C. 266, 9 S. E. 315.

a way as to make it real property, it was held that there was such a conversion as would support trover.¹ A co-tenant of certain timber contracted to sell the whole of it, directed the purchaser to the place where it stood, and instructed him how to remove it, later receiving the purchase-price. He was held liable in trover to his co-tenant.² Plaintiff and defendant entered into an agreement to farm land upon shares, each to furnish half the seed and manure, each to perform certain parts of the work, and to divide the crops equally; each performed the first part of the work and planted the crop; defendant refused to continue his part of the work; when the crop was ripe, plaintiff went upon the land, cut it and put it in stacks without permission of the defendant. The next night, without plaintiff's knowledge or consent, the defendant removed the entire crop and fed it to his cattle. The court held the defendant liable in trover.³

§ 225. **Removal and Conversion of Crops.** — Plaintiff and defendant's principal, being co-tenants of a tract of land, and plaintiff being in possession, he planted a number of acres of oats and raised a number of acres of hay on meadow-land. After he had harvested the oats and cut the hay, defendant, acting for the other tenant, entered upon the land and hauled off the oats and hay. The court sustained plaintiff's action of trover, saying that the plaintiff, having in due course of husbandry grown and severed the grass and oats while being, with the acquiescence of his co-tenant, legally and peaceably in possession of the land whereon they grew, became the sole owner of them and the defendant, by taking them away, became liable for their value.⁴ So, where tenants in common owned a mill, and one of them wrenched and carried away parts of the machinery, such removal was held a conversion.⁵ The court here said: "There is some conflict among the authorities, and it is difficult to draw or trace the shadowy line that marks the limit to which a tenant in common may go in the exercise of control over the common property without subjecting himself to liability for a conversion. But Schouler in his work on Personal Property (Vol. 1, p. 200) after taking the extreme ground that at common law nothing short of the destruction of the chattel, or the conversion of the whole to his own use, or something equivalent, will render the owner in possession

¹ *Benedict v. Howard*, 31 Barb. 571.

² *Wing v. Milliken*, 91 Me. 387, 40 Atl. 138, 64 A. S. R. 238.

³ *Delaney v. Root*, 99 Mass. 546, 97 A. D. 52. Perhaps in this case the court gave more weight to the fact that the defendant had destroyed the property by feeding it than to its removal.

⁴ *Le Barron v. Babcock*, 122 N. Y. 153, 25 N. E. 253, 19 A. S. R. 488, 9 L. R. A. 625.

⁵ *Waller v. Bowling*, 108 N. C. 289, 12 S. E. 990, 12 L. R. A. 261.

liable to his co-owners, says that mere dispossession of a co-tenant might 'if accompanied by other acts showing a hostile intent' amount to a conversion. It might seem that the violent wrenching of the machinery from the mill when the plaintiff was present, forbidding, was the strongest evidence of such intent."¹

§ 226. **Permitting Loss of Property.** — That property owned in joint-tenancy has been lost through the fault of one of the owners, is sufficient to render him liable for its conversion. In fact its loss amounts to a destruction of it, and the discussion of liability for a destruction of the joint property heretofore set out will apply equally to cases where the property has been lost. Thus, where part-owners of a ship seized it and took it to foreign parts against the consent of the others, this was not considered as sufficient to subject the seizing part-owners to an action; but when the vessel, while so absent was lost, its recapture thereby became impossible, the non-consenting owners recovered the value of their share in trover.² In another case, one joint owner of a promissory note surrendered it to the makers without the consent of his co-tenant. In sustaining an action against him for a conversion of the note, the court said: "It is not controverted that trover may be maintained for choses in action as well as for other personal property. This action could have been maintained against the appellee assuming that he was joint owner of the note with the appellant, if he had either sold or destroyed it. Certainly to surrender it to the makers to be by them cancelled or destroyed (for that was the purpose of the surrender) if done without the authority of the appellant, is as much an assumption of the right of disposing of another's property as could have resulted from its sale or destruction."³

§ 227. **Change from Personal to Real Property.** — So, if materials be taken by one tenant in common and annexed to a structure in such a manner that they are changed from personalty into realty, each change works a loss of the material to the other tenant and the former is subject to an action of trover for their value.⁴ On the contrary, a co-tenant cannot be held for a conversion where his act was with the view and effect of preserving, rather than losing the property. Thus, maintaining possession of logs and driving them out of a river to preserve them is not such an act of dominion as will amount to a conversion.⁵

¹ See, generally, Cooley, Torts, 455; Lucas v. Hardin, 3 Dev. L. 398; Thayer v. Gile, 42 Hun 268.

² Knight v. Coates, 1 Ired. L. 57.

³ Winner v. Penniman, 35 Md. 163, 6 A. R. 385.

⁴ Yamhill Bridge Co. v. Newby, 1 Ore. 174.

⁵ Kilgore v. Wood, 56 Me. 154, 96 A. D. 440.

§ 228. **Refusing to Segregate.** — It was an early unqualified rule that the taking and retaining exclusive possession of the common property by one tenant in common did not amount to a conversion as to his co-tenant, since in law the possession of one is deemed to be the possession of all, and the only remedy for the excluded one was an accounting. This rule no longer prevails in its entirety since where the chattels constituting the subject-matter of the co-tenancy are of a severable character, and one can take his share without injury to the remaining share, a refusal by the one in possession to permit the other to take his share is now held to be a conversion, since it is a dominion exercised over the property of a person in exclusion of and in defiance of his rights therein. Thus, where one tenant in common of cattle drove them away from the farm where they were kept to another place and refused to permit a division and denied all his co-tenant's right or interest in the cattle, locking them up in his barn and thereby appropriating them to his sole use, he was held liable in trover.¹ Where tenants in common of grain agree upon how it shall be divided and the one in possession locks it up and, on demand, refuses to let the co-tenant take any of it, there is such a conversion as will sustain trover.² Where plaintiffs raised a crop of grain on shares upon the land of defendant, and after it was cut defendant hauled it off, had it threshed and put in his granary, refused to give any of the grain to plaintiffs, and denied having any for them, this absolute denial of the rights and title of his co-tenants was a conversion.³ Where one tenant in common was bound by contract to deliver and divide the joint property at a certain place, but carried it beyond the designated place so that it was practically impossible for him to get the property back to the point of delivery agreed upon, so that division could not be made there, it was held that such acts constituted a conversion.⁴ "The case is not simply one where a tenant in common has excluded the co-tenant from a joint possession, but it is the case of a co-tenant bound by contract to divide the joint property at a certain place, appropriating it altogether to his own exclusive use under a claim of exclusive right, and under circumstances which render a division and delivery in the manner agreed upon practically impossible."⁵ The rule is general that in respect of property held in common which is severable in quantity or quality, by weight or measure, each tenant in common has the right to the

¹ *Potter v. Neal*, 62 How. Pr. 160.

² *Lobdell v. Stowell*, 51 N. Y. 74.

³ *Fiquet v. Allison*, 12 Mich. 328, 86 A. D. 54.

⁴ *Ripley v. Davis*, 15 Mich. 75.

⁵ *Ripley v. Davis*, *supra*.

possession of his share, and a refusal of the one in possession to honor a demand therefor, in effect denying any interest of the other tenant therein, will render him liable for a conversion.¹

§ 229. **Mis-use of the Property.** — Where one joint tenant mis-uses the common property by appropriating it to uses for which it was not designed, and refuses to apply it to purposes for which it was held by both, or if he delivers it to a stranger for purposes inconsistent with that for which it was intended, such will amount to a conversion as against the innocent tenant.²

§ 230. **Changing Form of Property.** — Property in the possession of one tenant in common may be so changed by him as to have lost its identity, in which instance the change, if made without the consent of the other tenant, will be a wrongful interference with such other's rights so as to make the guilty one liable for a conversion. Thus, where two parties were tenants in common of a quantity of timber and one, without the consent of the other, sold the timber, caused it to be hauled away and sawed into spool stock, in an action by the other tenant against the purchaser, the court held that a conversion took place when the timber was manufactured into spool stock. "The plaintiff might have brought replevin for the property and thereby have acquired the benefit of whatever labor had been bestowed upon it. Thus cloth made into a garment, leather into shoes, trees squared into timber, and iron converted into bars may be reclaimed by the original owner in their improved condition. The law neither divests him of his property nor requires him to pay for improvements made without his authority. It is only when the identity of the original material has been destroyed or its value is insignificant when compared with the article manufactured from it that the law is otherwise. To say that the owner may take the property in an action of replevin in an improved state, as all the authorities hold, and yet that he may not, when he sees fit to resort to an action of trover, recover the equivalent in damages, is a subtlety too refined to be adopted in the ordinary affairs of business transactions."³

§ 231. **Wrongful Intermingling of Chattels.** — The plaintiffs owned an undivided one-third of a certain quantity of shot-iron. The whole was taken by the defendants, who had purchased the other two-thirds, and by them mixed with other iron and manufactured into various wares, so that the shot-iron could no longer be traced or

¹ Carr v. Dodge, 40 N. H. 403; Burns v. Winchell, 44 Hun 263; Stall v. Wilbur, 77 N. Y. 163; see Powell v. Hill, 64 N. C. 171; Webb v. Mann, 3 Mich. 139; Lowe v. Miller, 3 Gratt. (Va.) 205, 46 A. D. 188.

² Agnew v. Johnson, 17 Pa. St. 377, 55 A. D. 565.

³ Wing v. Milliken, 91 Me. 387, 40 Atl. 138, 64 A. S. R. 238.

identified. The court held such mixing and changing the form of the property a conversion, saying, "We think these acts of the defendants placed the common property as completely beyond the plaintiffs' reach as the destruction of it would."¹

§ 232. **Excluding Co-owner from Possession.** — A tenant in common cannot maintain trover for a dispossession of the common chattel by his co-tenant.² One tenant in common of chattel property cannot maintain trover against the vendee of the original co-tenant, while he remains in possession of the property claiming it as the sole owner.³ Trover cannot be maintained by one tenant in common against his co-tenant for taking all or any portion of crops owned jointly, and merely withholding them and refusing to allow the former to participate in the use of them.⁴ Each of the tenants is equally entitled to the possession of the joint property, and if the possession of one excludes the other, this does not amount to a conversion. There is no liability at law unless the co-tenant has been guilty of an actual or practical conversion or an actual or practical destruction of the common property.⁵ Where property owned in common is not in its nature divisible, a mere refusal of one tenant in common to yield possession of the property or to admit his co-tenant to a joint possession, without denying his interest or ownership, does not constitute a conversion.⁶

§ 233. **Same Subject; Whether Property Severable.** — While the above authorities announce the general rule, there is clearly a distinction between cases involving property in its nature indivisible and those where the subject-matter of the co-tenancy is clearly severable. "It is laid down by most of the authorities that a refusal, by one tenant in common of a chattel, to relinquish possession is no conversion, because each has as good a right to the possession as the other. But it can hardly be questioned that the refusal of any one to give up to another that to which such other has a better right, would be a conversion. The doctrine referred to applies to things in their nature so far indivisible that the share of one cannot be distinguished from that of the other. But it can have no reasonable application to such commodities as are readily divisible, by tale or measure, into portions absolutely alike in quality as grain or money."

¹ *Redington v. Chase*, 44 N. H. 36, 82 A. D. 189.

² *Farr v. Smith*, 9 Wend. 338, 24 A. D. 162.

³ *Kilgore v. Wood*, 56 Me. 150, 96 A. D. 440.

⁴ *Ballou v. Hale*, 47 N. H. 347, 93 A. D. 438.

⁵ *Robinson v. Dickey*, 143 Ind. 205, 42 N. E. 679 and 638, 52 A. S. R. 416, and numerous cases there cited.

⁶ *Tuttle v. Campbell*, 74 Mich. 652, 42 N. W. 384, 16 A. S. R. 652.

Therefore, the court holds the defendants liable in trover for refusing to surrender to plaintiff his portion of the grain held by them in common.¹

13. PURCHASERS FROM UNAUTHORIZED VENDORS

§ 234. **General Principles.** — It is a maxim of the common and civil law that *nemo plus juris in alium transferee potest quam ipse habet*, and a sale *ex vi termini* imports nothing more than that the *bona fide* purchaser succeeds to the rights of the vendor. It has frequently been held in this country that the English law of market overt had not been adopted; and consequently, as a general rule, the title of the true owner cannot be lost without his own free act and consent.² So that even an honest purchaser under a defective title cannot hold against the true owner.

§ 235. **Innocent Purchaser Cannot Hold against True Owner.** — In elucidation of this rule, I will quote at length from an elaborate opinion of Senator Verplanck in the case of *Saltus v. Everett*,³ where the question is so thoroughly discussed as to leave very little to be said upon the subject: "The main question depends upon and involves the general rule that ought to govern between the conflicting rights of *bona fide* purchasers of personal property, bought without notice of any opposing claim, and those of the original owner divested of the possession or control of his property by accident, mistake, fraud or misplaced confidence. The original owner now claims his lead against purchasers who bought for a fair price, in the usual course of trade, from persons holding the usual evidence of such property (a bill of lading indorsed to them), and in actual possession of the goods. Of these two innocent parties, which of the two is to bear the loss arising from the wrong-doing of a third?"

"The universal and fundamental principle of our law of personal property is, that no man can be divested of his property without his own consent; and, consequently, that even the honest purchaser under a defective title, cannot hold against the true proprietor. . . . To whatever and however numerous exceptions this rule of our law may be subject, it is unquestionably the general and regulating principle, modified only by the absolute necessity or the obvious policy of human affairs. The Chief Justice of the Supreme Court

¹ *Fiquet v. Allison*, 12 Mich. 328, 86 A. D. 54. See *Knope v. Nunn*, 151 N. Y. 506, 45 N. E. 940, 56 A. S. R. 642; *Schouler, Personal Property*, Vol. 1, p. 200; *Cooley, Torts*, 455; *Grove v. Wise*, 39 Mich. 161; *Dain v. Cowing*, 22 Me. 347, 39 A. D. 585.

² *Kent's Commentaries*, vol. 2, 324.

³ 20 Wend. 267, 32 A. D. 541.

has said, in his opinion on this case, that 'it must be conceded that a purchaser for a fair and valuable consideration in the usual course of trade, without notice of any conflicting claim or any suspicious circumstances to awaken inquiry, or to put him on his guard, will, as a general rule, be protected in his purchase, and unaffected by any latent claim. But there are exceptions to this rule.' Now I cannot agree with the learned Chief Justice that this is the general rule. On the contrary, I think it obvious that it is but the broad statement of a large class of exceptions to the operation of a much more general principle, and that statement is subject again to many limitations. I have stated the general and governing law; let us now see what are precisely the exceptions to it.

"The first and most remarkable class of these exceptions relates to money, cash, bank bills, checks and notes payable to the bearer or transferable by delivery, and in short, whatever comes under the general notion of currency. . . . Setting wholly aside, then, this part of the law as to cash, bank notes and bills to bearer, as founded on the peculiar necessities of currency and trade, and regulated by decisions and usages peculiar to itself, what rules do we find to obtain in instances of conflict between the rights of original owners and those of fair purchasers? After a careful examination of all the English cases and those of this state that have been cited or referred to, I come to this general conclusion, that the title of property in things movable can pass from the owner only by his own consent and voluntary act, or by operation of law; but that the honest purchaser who buys for a valuable consideration in the course of trade, without notice of any adverse claim, or any circumstances which might lead a prudent man to suspect such adverse claim, will be protected in his title against the original owner in those cases, and those cases only, where such owner has, by his own direct voluntary act, conferred upon the person from whom the *bona fide* vendee derives title, the apparent right of property as owner, or of disposal as an agent. I find two distinct classes of cases under this head, and no more.

"1. The first is, when the owner, with the intention of sale, has in any way parted with the actual property of his goods, with his own consent, though under such circumstances of fraud or error as would make that consent revocable, rescind the sale, and authorize the recovery of the goods as against the vendee. But if the property passes into the hands of honest purchasers, the first owner must bear the loss. . . . In all such cases, to protect the new purchaser there must be a full consent of the owner to the transfer of the property,

though such consent might be temporary only, obtained by fraud or mistake, and therefore enforceable against such unfair first purchaser.

“ 2. The other class of cases in which the owner loses the right of following and reclaiming his property is where he has, by his own voluntary act or consent, given to another such evidence of the right of selling his goods as, according to the custom of trade, or the common understanding of the world, usually accompanies the authority of disposal; or, to use the language of Lord Ellenborough, when the owner ‘has given the external *indicia* of the right of disposing of his property.’ Here it is well settled that, however the possessor of such external *indicia* may abuse the confidence of his principal, a sale to a fair purchaser divests the first title, and the authority to sell so conferred, whether real or apparent, is good against him who gave it. . . . Again: The owner may lose the right of recovering his goods against purchasers, by exhibiting to the world a third person as having power to sell and dispose of them; and this, not only by giving a direct authority to him, but by conferring an implied authority. Such authority may be implied by the assent to and ratification of prior similar dealings, so as to hold such person out to those with whom he is in the habit of trading, as authorized to buy and sell. But the implied authority must arise from the natural and obvious interpretation of facts according to the habits and usages of business; and it never applies where the character and business of the person in possession do not warrant the reasonable presumption of his being empowered to sell property of that kind. When these exceptions cease, the general rule resumes its sway; and the law is therefore clear, that an agent for a particular purpose, and under a limited power, cannot bind his principal if he exceeds his power.

“ Beyond the precise exceptions I have above stated, I think our law has not carried the protection of the fair vendee against the defrauded or unfortunate owner. It protects him when the owner’s mis-placed confidence has voluntarily given to another the apparent right of property or of sale. But if the owner loses his property or is robbed of it, or if it is sold or pledged without his consent by one who has only a temporary right to its use by hiring, or otherwise, or a qualified possession of it for a specific purpose, as for transportation, or for work to be performed upon it, the owner can follow and reclaim it in the hands of any person however innocent.”

§ 236. **Owner Divested of Property only by Own Act.** — Therefore, the general principle being well established that a person cannot be divested of his property except through his voluntary act or by

transferring temporary possession to another under such circumstances that he will be estopped to say that such other had not the right to dispose of it, it remains to be seen what is the status of such owner as regards a purchaser from one who had no authority to sell. That the owner may bring replevin if he can trace the property, is well established.¹ But this is not his only remedy. A person purchasing property of the party in possession, without ascertaining where the true title is, does so at his peril, and although honestly mistaken, will be liable to the owner for a conversion.² A seller of personal property can convey no greater title than he has, and it makes no difference that the purchaser has no notice and is ignorant of the existence of other parties in interest.³ "The defendant stands in no better situation than any other who purchases an article from a party without title or authority to dispose of such article; in such case the purchaser acquires no title. The true owner has the right to reclaim his property and to hold any one responsible who has assumed the right to dispose of it."⁴ Plaintiff was the owner of a ten-dollar gold piece of "Moffat's issue" of California coins, and not United States issue. By mistake this was passed as a half dollar, and by such other passed as a half dollar to the defendant who knew its value. Upon defendant's refusal to surrender it, trover was brought against him for the value of the coin, and the court held that by the receiving plaintiff's coin and claiming it as his own, the defendant was guilty of a conversion of it.⁵

§ 237. **Possession not Evidence of Right to Sell Chattels.** — In an action of trover for conversion of certain jewelry of which plaintiff had the title by virtue of a mortgage, the court said: "Possession is not, as in the case of mercantile paper and money, assurance of title or authority to dispose of. The servant intrusted with the possession of his master's property does not thereby give authority to sell it or to authorize another to sell it. The borrower of a chattel, or the ordinary bailee, does not by his possession gain any such power. And in short, the rule that no one can be deprived of his title without his own consent has no such exception as is sought to be created in this case. And the converse rule, that he who assumes to deal or

¹ *Marshall v. Jones*, 11 Me. 54, 25 A. D. 258.

² *Omaha, etc. Co. v. Tabor*, 13 Col. 41, 21 Pac. 925, 16 A. S. R. 185, 5 L. R. A. 236, citing, *Gilmore v. Newton*, 9 Allen (Mass.) 171, 85 A. D. 749; *Spraghts v. Hawley*, 39 N. Y. 441, 100 A. D. 452; see *Hoffman v. Carow*, 20 Wend. 22, s. c. 22 Wend. 295.

³ *Couse v. Fregent*, 11 Mich. 65; *Pease v. Smith*, 61 N. Y. 477; *Pearce v. Bowker*, 115 Mass. 129.

⁴ *Williams v. Merle*, 11 Wend. 80, 25 A. D. 604, where the purchaser was held liable in trover.

⁵ *Chapman v. Cole*, 12 Gray. 141, 71 A. D. 739.

intermeddle with personal property which is not his own must see to it that he has a warrant therefor from some one who is authorized to give it, has no such qualification. If he buys from or consents to act by the direction of another, he must see to it that in the responsibility of such other he can find indemnity if his confidence is misplaced.”¹ Having thus set forth the general rule as to liability to the original owner, of purchasers from unauthorized vendors, I shall now attempt the application of the rule to purchasers from vendors acting in various capacities.

§ 238. **Purchasers from Pledges and Bailees.** — When the owner of property in pledging it confers upon the pledgee an apparent title to or power of disposition over it, he is estopped as against an innocent purchaser from such pledgee, without notice of the true ownership, from asserting a title contrary to that of such an apparent owner.² Such purchaser in good faith and for value succeeds to the rights of the pledgee, and the owner of the property cannot recover in the same manner as in the case of a naked tort.³ In further exposition of this idea, it has been said that a purchaser of property at a pawnbroker's sale made without notice to the owner, if sued for a conversion of the property, has the right to reduce the damages by the amount of money due the pledgee, where the property was pledged by the husband of the owner with authority to raise money on the property but not to authorize it to be sold.⁴ So, an honest purchaser of pledged property which had been converted by the pledgor will be protected if the true owner had made it possible for the pledgor to perpetrate a fraud in the matter.⁵ When the owner has given to another or permitted him to have control of the property, no one can be held responsible in tort for its conversion who merely makes such use of the property as is warranted by the authority thus given.⁶

§ 239. **Same Subject.** — It will thus be seen that most of the cases cited absolve a purchaser from the pledgee from liability for a conversion on the ground of good faith of such purchaser and on the further ground that by creation of the relation of pledgor and pledgee the former makes the latter his agent and therefore is responsible for his acts; and since the pledgor clothes the pledgee with all the *indicia* of ownership, he cannot hold a purchaser to accountability.

¹ *Spraghts v. Hawley*, 39 N. Y. 441, 100 A. D. 452.

² *McNeill v. Bank*, 46 N. Y. 325, 7 A. R. 341.

³ *Williams v. Ashe*, 111 Cal. 180, 43 Pac. 595.

⁴ *Van Arsdale v. Joiner*, 44 Ga. 173; *Belden v. Perkins*, 78 Ill. 449.

⁵ *Myers v. Bank*, 27 Abb. Pr. N. S. 266.

⁶ *Hills v. Snell*, 104 Mass. 173, 6 A. R. 218; citing *Strickland v. Barrett*, 20 Pick. 415; *Burbank v. Crooker*, 7 Gray. 158.

There is no question of the correctness of rule as applied to the property the inherent nature of which would indicate that possession constituted ownership, such as commercial paper, stock certificates, or instruments usually denominated collateral securities, provided, of course, that such purchaser had no notice that the property was pledged. Thus, it has been held that a pledgee of negotiable securities should be treated as the agent of the owner and the latter should be bound by his acts, so that if he transferred the securities to a third party, the latter taking them in good faith, should be protected.¹ But if the purchaser knew that the securities were merely pledged, he is not protected even though such securities be indorsed in blank.²

§ 240. *Same Subject; Rule of Caveat Emptor Applied.*—Where the agent of the owner of a note tortiously pledged it for a debt of his own, and the pledgee, without knowledge of the true ownership, sold the note and received the proceeds, and the true owner afterward demanded the note from the pledgee, the latter, being unable to respond to the demand, was held guilty of conversion.³ Between strangers and the vendees of personal property, the maxim *caveat emptor* is properly applied to the purchaser. How can it be material in a question of general ownership, whether a vendor of a pretended title has imposed upon the vendee by a possession gained by a bailment or otherwise? If he was intrusted with a possession only, without any authority to sell, the seller is acting *mala fide* from the time he proposes to sell, and the vendee, if he is acquainted with the nature of the trust reposed, is acting also *mala fide* in making the purchase; but if he does not know the nature of the trust, nor the manner nor circumstances under which the vendor has acquired the possession, the purchaser is then acting upon the assurance given by the vendor, either expressly or by implication, that the right of absolute ownership is in himself, or, if the assurance shall prove false, that he will be able to make good the loss which shall be occasioned thereby. “Upon the whole, we are clear that the owner of goods may maintain trover against his bailee, who may have converted them to his own use, or at his election may have an action against the vendee for the goods themselves, or their value if retained or converted.”⁴

¹ Coit v. Humbert, 5 Cal. 260, 63 A. D. 128.

² Goldsmidt v. Church, 25 Minn. 202; Rogers v. Insurance Co., 8 N. J. Eq. 167.

³ Kentgen v. Parks, 2 Sandf. 60.

⁴ Chism v. Woods, Hardin (Ky.) 531, 3 A. D. 740. See Calvin v. Bacon, 11 Me. 28, 25 A. D. 258; Kitchell v. Vanadan, 1 Blackf. 356, 12 A. D. 249; Norton v. Baxter, 41 Minn. 146, 42 N. W. 865, 4 L. R. A. 305; Sheridan v. Presas, 18 Misc. 180; Felt v. Heye, 23 How. Pr. 359; Hilgert v. Levin, 72 Mo. App. 48; Scollans v. Rollins, 173 Mass. 275, 53 N. E. 863, 73 A. S. R. 284, and numerous cases there cited.

§ 241. **Purchaser from Co-tenant.** — The general rule hereinbefore adverted to, that a purchaser of property acquires only such right to, or interest in, it as his vendor has authority to convey, and that an owner of personalty cannot be divested of it except by his own consent, express or implied, is applicable to vendees of a tenant in common. Therefore, the purchaser at a sale made by a part owner, assuming to be the owner of and to have the right to sell the entire property, gets only such title and interest therein as his vendor had. The purchaser thereupon becomes substituted for his vendor in the co-tenancy, and is subject to all the rights as well as the liabilities of that relation. Hence, he cannot be held liable for a conversion of the common property by merely remaining in the possession of it, even under a claim that he is the sole owner.¹ It will not be questioned that, as a general rule, one tenant in common cannot maintain trover against his original co-tenant where the latter remains in possession of the property. It is equally well established that if one tenant in common has possession of the common property, and sells the whole of it as his, that his co-tenant may maintain trover against him for his half of the value. But no decision has gone so far as to authorize the maintaining of an action of that kind against the vendee of the original co-tenant remaining in possession of the article; or against any one in possession of the property by virtue of a sale under him; any one, being in possession of the property under such sale, being deemed a co-tenant with any rightful owner of any portion thereof. But every successive sale of such co-tenant's portion may amount to a conversion, so that trover may be maintained against each until satisfaction be obtained from some one of them.²

§ 242. **Purchaser from Agent.** — A principal is bound by all acts of his agent within the scope of his authority, which he holds him out to the world as possessing, although he may have given him more limited private instructions unknown to the person dealing with him; and this is founded on the doctrine that where one of two persons must suffer by the act of a third person, he who has held that person out as worthy of trust and confidence and having authority in the matter, shall be bound by it.³ This doctrine applies with equal force to protect third persons where a principal has clothed his

¹ Trammell v. McDade, 29 Tex. 360; Gilbert v. Dickerson, 7 Wend. 449, 22 A. D. 592.

² Dain v. Cowing, 22 Me. 347, 39 A. D. 585; Welch v. Clark, 12 Vt. 681, 36 A. D. 368; Kilgore v. Wood,⁵ 56 Me. 150; Weld v. Oliver, 21 Pick. 564; Dyckman v. Valiente, 42 N. Y. 560.

³ Story on Agency, sec. 127.

agent, general or special, with all external *indicia* of property and third persons have dealt with the agent, supposing him to be the sole principal, without any knowledge that the property involved belonged to another.¹

§ 243. **Where Sale in Usual Course of Trade.** — Thus, if goods are delivered to a merchant who is engaged in selling similar goods, this is sufficient evidence of authority in the merchant to sell that one who purchases will be protected against the claim of the owner.² A sale in the usual course of business by a broker, factor or commission merchant, in excess of instructions, is a good title to a *bona fide* purchaser, because the nature of the business of such seller imports authority to sell from which the owner cannot escape the results.³ Upon the same principle, it has been held that if the purchaser of goods permit his vendor to remain in possession, a subsequent *bona fide* purchaser from such vendor, without notice of the original sale, will obtain a good title.⁴ But it has been said that bare possession is not sufficient to authorize even a dealer in the same kind of goods to sell property left with him. Thus, the owner of a diamond ring put it in the hands of a jeweler to match, or failing in that, to get an offer for it. The jeweler sold it and the owner brought trover against the purchaser for the conversion of the ring. In sustaining the judgment for the plaintiff, the court said: "At the common law a person in possession of goods cannot confer upon another, either by sale or pledge, any other or better title to the goods than he himself has. To this general rule there is an apparent exception in favor of *bona fide* purchasers or pledgees where the party in possession making the sale or pledge has a title defeasible on account of fraud, or by reason of a condition in the contract of sale under which he holds.⁵ Therefore, to make either a sale or a pledge valid as against the real owner, where the sale or pledge is made by another person, it is incumbent upon the person claiming under such sale or pledge to show that the party making it had authority from the owner. If, however, the real owner of the goods has so acted as to clothe the seller or pledgor with apparent authority to sell or pledge, he will, even by the common law, be precluded from denying, as against those who may have acted *bona fide* on the faith of that apparent authority, that he had given such authority, and the result as to them is the

¹ *Id.*, secs. 93, 227, 443.

² *Wright v. Solomon*, 19 Cal. 64, 79 A. D. 196.

³ *Jones v. Hodgkins*, 61 Me. 480; *Arnold v. Hollenbake*, 5 Wend. 34; *Nixon v. Brown*, 57 N. H. 34.

⁴ *Cullom v. Guillot*, 18 La. Ann. 608.

⁵ Citing *Hall v. Hinks*, 21 Md. 406; *Donaldson v. Farwell*, 93 U. S. 631.

same as if he had really given it; but it is of course otherwise as to those who may have acted with notice of the want or limitation of authority in point of fact. . . . In regard to the dealing with agents and factors it is very clear that the bare possession of goods by one, though he may happen to be a dealer in that class of goods, does not clothe him with power to dispose of the goods as though he were the owner, or as having authority as agent to sell or pledge the goods, to the preclusion of the right of the real owner. If he sells as owner, there must be some other *indicia* of property than mere possession. There must be some act or conduct on the part of the real owner whereby the party selling is clothed with the apparent ownership or authority to sell, and which the real owner will not be heard to deny or question to the prejudice of an innocent third party dealing on the faith of such appearances. If it were otherwise, people would not be secure in sending their watches or articles of jewelry to a jeweler's establishment to be repaired, or cloth to a clothing establishment to be made into garments." ¹

§ 244. **Where Agent Violates Instructions.** — The foregoing case announces the general principle which most courts adhere to. But the last part of the argument quoted is questioned. Thus, in a case where plaintiff had put an agent in charge of a raft of timber to conduct it to a town down the river and there deliver it to a factor of such plaintiff, the agent violated his instructions and, claiming to be the owner, sold it to an agent of the defendant who had no knowledge that another than the seller owned the timber. In holding that the trial court should have submitted to the jury the question whether the plaintiff had held out to the world that his agent had authority to sell the timber, the appellate court said: "It will not do to say that if the jury should regard Higgins (plaintiff's agent) as entitled to sell, then no owner of timber can trust it to a carrier without incurring the risk of loss. One obvious answer is, let the owner employ an honest and responsible carrier; and another is, let him take care to show by some suitable means that the carrier is neither the owner nor an agent to sell." ²

§ 245. **Agent Merely Intrusted with Possession.** — So the rule deduced from the authorities is that title to personal property cannot be acquired from one who has no title himself; that consequently, an agent, merely intrusted with possession of such property, does not, from the fact of possession alone, have authority to transfer the title of his principal; but that, where the principal has clothed

¹ *Levi v. Booth*, 58 Md. 305, 42 A. R. 332.

² *Carmichael v. Buck*, 10 Rich. L. 332, 70 A. D. 226.

the agent with all the *indicia* of ownership, and third persons have dealt with him on the strength of such *quasi* representations of the principal, the latter will not be heard to say as against an innocent purchaser in good faith from the agent that such agent had no authority to sell.¹

§ 246. **Purchasers from Vendees in Conditional Sales.** — The vendee in a conditional sale, is as a general rule held to be a bailee for a special purpose, and having only the right of possession, he can convey no title by the sale of the property to another.² So, a conditional vendee having no title to convey, his vendee, even though in good faith, acquires no right in the property as against the original vendor, if no negligence in maintaining his rights can be imputed to him.³ This is almost, but not quite, the universal holding of the courts, unless a contrary statutory provision exists. But in a few states it is said that if a person agrees to sell another a chattel on condition that the price shall be paid within a certain time, retaining title in himself in the meantime, and delivers the chattel to the vendee so as to clothe him with the apparent ownership, a *bona fide* purchaser from the latter is entitled to protection as against the original vendor.⁴ In other states, statutes provide in effect that no agreement that personal property, bargained and delivered to another, shall remain the property of the vendor, shall be valid against third persons having no notice of such an agreement.⁵ With such exceptions, the rule sustaining the right of the original vendor to pursue the property or recover its value if the conditional sale be not complied with, is general, although doubt is frequently expressed as to the wisdom or justness of such rule. In elucidation of the rule, one authority has said: "All the cases turn on the principle that the compliance with the conditions of the sale and delivery is by the terms of the contract precedent to the transfer of the property from the vendor to the vendee. The vendee in such cases acquires no property in the goods.

¹ Velsian v. Lewis, 15 Ore. 539, 16 Pac. 631, 3 A. S. R. 184; Stanley v. Gaylord, 1 Cush. 536, 48 A. D. 643; Hoke v. Buell, 50 Mich. 89, 14 N. W. 710; Harpending v. Meyer, 55 Cal. 557; Preston v. Wetherspoon, 109 Ind. 457, 9 N. E. 585, 58 A. R. 417; Cowdrey v. Vanderburgh, 101 U. S. 572; Hyde v. Noble, 13 N. H. 494, 38 A. D. 508; Freeman v. Underwood, 66 Me. 233; Saltus v. Everett, 20 Wend. 267, 32 A. D. 541; Williams v. Merle, 11 Wend. 80, 25 A. D. 604.

² Harkness v. Russell, 118 U. S. 663.

³ Ketchum v. Brennan, 53 Miss. 596; Sumner v. Woods, 67 Ala. 139, 42 A. R. 104.

⁴ Brundage v. Camp, 21 Ill. 310; Lucas v. Campbell, 88 Ill. 447; Van Duzor v. Allen, 90 Ill. 499; Hark v. Linderman, 64 Pa. St. 499, 3 A. R. 612; Watts v. Green, 35 Barb. 585, 36 N. Y. 556; but see Ballard v. Burgett, 40 N. Y. 314, a later New York case.

⁵ Thorpe v. Fowler, 57 Ia. 541, 11 N. W. 3; Duncans v. Stone, 45 Vt. 123; Rogers v. Whitehouse, 71 Me. 222; King v. Bates, 57 N. H. 446; George v. Stubbs, 26 Me. 243; Kinttel v. Cushing, 57 Tex. 354, 44 A. R. 598.

He is only a bailee for a specific purpose. The delivery which in ordinary cases passes the title to the vendee must take effect according to the agreement of the parties, and can operate to vest the property only when the contingency contemplated by the contract arises. The vendee therefore in such cases, having no title to the property, can pass none to others. He has only a bare right of possession and those who claim under him, either as creditors or purchasers, can acquire no higher or better title. Such is the necessary result of carrying into effect the intention of the parties to a conditional sale and delivery. Any other rule would be equivalent to the denial of the validity of such contracts. But they certainly violate no rule of law, nor are they contrary to sound policy."¹

§ 247. **Same Subject; No Title Passes.** — Therefore, under the familiar principle that purchasing personal property from one who has no authority to sell, and holding it to the buyer's use, is a conversion for which either replevin or trover will lie, it is the rule that a purchaser from a vendee in a conditional sale gets no title, and will be liable in trover or replevin in favor of the original vendor. Thus, in a case where one purchased from the defendant company a safe on credit, under a contract that title should remain in the company till payment of the purchase-price was made, and subsequently the safe was sold by such purchaser to the plaintiff who bought it in good faith and paid for it without knowledge of the conditional agreement, it was held that the plaintiff obtained only such title as his vendor had, that the company remained the owner and could maintain trover for its conversion.² Likewise, where plaintiff agreed with another that if the latter would clear certain lands, he should have a horse; the horse was delivered under the agreement that title should not pass until the land was cleared; the work was abandoned and the horse sold to another, and by him again sold to defendant. The defendant treated the horse as his own and stated to the original vendor that he would have to look to the conditional vendee; the court held this a conversion and the defendant liable to plaintiff for the value of the horse.³ In another case the court, in

¹ *Coggill v. Hartford, etc. Co.*, 3 Gray 545; *Cole v. Berry*, 42 N. J. L. 308, 36 A. R. 511; *Lewis v. McCabe*, 49 Conn. 140, 44 A. R. 217; *Aultman v. Mallory*, 5 Neb. 178, 25 A. R. 478; *Sumner v. Woods*, 67 Ala. 139, 42 A. R. 104; *Sargent v. Metcalf*, 5 Gray 306, 46 A. D. 368; *McGirr v. Sell*, 60 Ind. 249; *Sumner v. Cottage*, 71 Mo. 121; *Redewill v. Gillen*, 4 N. Mex. 72, 12 Pac. 872; *Harkness v. Russell*, 118 U. S. 663; *Newmark, Sales*, sec. 19; *Singer Co. v. Graham*, 8 Ore. 17, 34 A. R. 572; 15 Am. L. Rev. 380, title "Conversion By Purchase."

² *Marvin Safe Co. v. Norton*, 48 N. J. L. 412, 57 A. R. 566; *Zuchtmann v. Roberts*, 109 Mass. 53, 12 A. R. 663, an extreme case.

³ *Houston v. Dyche*, Meigs 76, 33 A. D. 130.

holding the purchaser of a buggy from a conditional vendee liable in trover, based its decision on the principle stated thus by Cooley:¹ "One who buys property must, at his peril, ascertain the ownership, and, if he buys from one who has no authority to sell, his taking possession in denial of the owner's right is a conversion. . . . So, it is no protection to one who has received property and disposed of it in the usual course of trade that he did so in good faith, and in the belief that the person from whom he took it was the owner, if in fact the possession of the latter was tortious."² And where a person had received goods from the owner with the right to use them and to become the owner of them upon the fulfillment of conditions, but until then he should not sell or remove them without the owner's consent, and they should not become his until paid for, but he did, nevertheless, sell them to a third person who removed and resold them, it was held that the third person was liable to the owner of the goods for their conversion, although he had acted in good faith and had parted with them before any demand was made upon him for their return.³

§ 248. **Purchasers from Fraudulent Vendees.** — The doctrine seems to be well established that where a vendor is induced by fraudulent representations to deliver property to a dishonest or irresponsible purchaser, yet, if that purchaser transfer it for a valuable consideration to a third person having no notice of the fraud, and acting in good faith, such third person will hold the property in preference to the original seller. The general rule of law, sanctioned by common sense, is, that no man can by his sale transfer to another the right of ownership in a thing wherein he himself has not the right of property, except — and this for the sake of sustaining the currency — in the instances of cash, bank bills, checks and notes payable to bearer or transferable by delivery in the ordinary course of business, to a person taking it *bona fide* and paying value for it. No one can sell a right when he himself has none to sell. This is a proposition so self evident that argument cannot elucidate or strengthen it. It is true that possession of personal property is one *indicium* of ownership, and is *prima facie* evidence of title to the thing. The bare possession of goods is a strong inducement to believe that the possessor is the true owner; and when to this is added proof of an actual sale and delivery to him by the real owner, though by fraudu-

¹ Torts, 451.

² *Woods v. Nichols*, 21 R. I. 537, 48 L. R. A. 773; *Goodell v. Fairbrother*, 12 R. I. 233, 34 A. R. 631; *Sanders v. Keber*, 28 Ohio St. 630; *Burbank v. Crooker*, 7 Gray 158, 66 A. D. 470; *Dunbar v. Rawles*, 28 Ind. 225, 92 A. D. 311.

³ *Carter v. Kingman*, 103 Mass. 517.

lent pretenses, a subsequent sale by such purchaser to a *bona fide* purchaser, without notice of any fraud in the alleged sale and delivery to his vendor, has been held to confer title upon such subsequent *bona fide* purchaser. The maxim of "He who trusts most shall lose most" is held to obtain in such cases. This maxim, so generally accepted, may be open to some just criticism. Does the party who parts with the possession of property, or the use of a thing capable of easy identification, trust more than he who pays his money to a vendor upon affirmance or assurance that the thing sold is his own, and he a stranger? There being, upon sale of personal property, an implied warranty of title, a vendee has his action against the vendor if his title proves deficient. The buyer must then take care that he is not deceived by dealing for a pretended title, or that his vendor is able to respond in damages for any loss which may happen to the vendee.¹

§ 249. **Where Owner Clothcd Vendee with Indicia of Ownership.** — But these observations apply only where the original owner has never in fact parted with possession of his property or clothed a vendee with the *indicia* of ownership; if in fact he consent to the transfer, though such consent be only temporary and obtained by fraud, and therefore revocable against such unfair purchaser, yet a *bona fide* purchaser from him will be protected and the original owner must bear the loss.² This is true upon the principle that such second purchaser is one in good faith and for a valuable consideration; and in such case the vendor who has been defrauded of his property, and the *bona fide* purchaser from the fraudulent vendee are both innocent parties; and when one of two innocent parties must suffer from the fraud of a third, the loss must fall on him who enables such third person to commit the fraud.³ The first question in such cases is whether the owner has parted with title to his property; for one who so parts with title by a sale, which has been procured by a fraud upon him, cannot recover either the specific property or its value from one to whom the fraudulent vendee has sold it, the latter having no notice of the fraud.⁴ "We take the rule to be well settled that, where there is a contract of sale, and an actual delivery pursuant to it, a title to the property passes, but voidable and defeasible, as between the vendor and vendee, if obtained by false and fraudulent

¹ Fawcett v. Osborn, 32 Ill. 411, 83 A. D. 728; citing Root v. French, 13 Wend. 572, 28 A. D. 428.

² Jennings v. Gage, 13 Ill. 614, 56 A. D. 476.

³ Fawcett v. Osborn, *supra*.

⁴ Saltus v. Everett, 20 Wend. 267, 32 A. D. 541; Dows v. Rush, 28 Barb. 184; Dows v. Greene, 24 N. Y. 644.

representations. The vendor therefore can reclaim his property as against the vendee, or any other person claiming under him and standing on his title, but not against a *bona fide* purchaser without notice of the fraud. The ground of exception in favor of the latter is, that he purchased of one having a possession under a contract of sale, and with title to the property, though defeasible and voidable on the ground of fraud; but as a second purchaser takes without fraud and without notice of the fraud of the first purchaser he takes a title free from the taint of fraud.”¹

§ 250. **Where Contract of Sale Void.** — In a case where one, relying on representations of a second party that he was agent of a third, sold him hogs on the credit of such third party, delivered them to him and received part of the price from the purported agent; the self-styled agent had no authority as such, and the third party bought the hogs from him without knowledge of any fraud. It was held that title did not pass because it was not a sale to the so-called agent in his own right, the owner did not agree to sell to any other than the third party and on his sole credit, the third party never agreed to buy from the owner, and consequently there was a contract not merely voidable, but an agreement wholly void.²

§ 251. **When Purchaser has Paid Value.** — But in order that a purchaser from a fraudulent vendee may be protected he must have parted with value upon the apparent title of the wrong-doer and his right to dispose of the property.³ “There is no good reason or equity in placing the burden of a fraudulent sale upon a *bona fide* vendor rather than upon a *bona fide* purchaser from the fraudulent vendee, unless the purchaser has parted with his money or some value, upon the credit of possession or some evidence of title in the vendee, received from the original owner, and by means of which he has induced the purchaser to treat with him as owner.”⁴

§ 252. **Stolen Property.** — It is but a reiteration here to say that in the sale of goods a purchaser must look to his title, and if he obtains them from one who is neither the owner nor his authorized agent, he gets no title maintainable against the true owner. Upon this principle, if the goods have been stolen the property in them does not

¹ Rowley v. Bigelow, 12 Pick. 307, 23 A. D. 607; Moody v. Blake, 117 Mass. 26; LeGrand v. Bank, 81 Ala. 123, 1 So. 460, 60 A. R. 140.

² Hamet v. Letcher, 37 Ohio St. 356, 41 A. R. 519; Barker v. Dinsmore, 72 Pa. St. 427, 13 A. R. 697; Hoffman v. Noble, 6 Metc. (Mass.) 68; Newmark on Sales, sec. 174; Sinclair v. Healy, 40 Pa. St. 417; Bradeen v. Brooks, 22 Me. 463; Alexander v. Swackhamer, 105 Ind. 81, 4 N. E. 433, 5 N. E. 908, 55 A. R. 180.

³ Barnard v. Campbell, 58 N. Y. 73, 17 A. R. 208.

⁴ Id.; Farley v. Lincoln, 51 N. H. 577, 12 A. R. 183; Morrow Co. v. New England Co., 57 Fed. 685, 24 L. R. A. 417.

pass by delivery (unless, indeed, they be instruments in form negotiable) and a person who derives his title from or through the thief gains no rights as against the lawful owner, and if he either refuses upon the demand to give them up, or sells them and turns them into money, or otherwise converts them to his own use, he is liable to the lawful owner in trover.¹ This doctrine has its foundation in public policy which admonishes purchasers thereby to be more cautious in the purchases they make and not by their zeal for cheap bargains to offer encouragement to thieves, who, if the loose habit of purchasers to buy everything offered for sale should no longer obtain, would find less profit in plying their avocation. Every vendee should have good reason to believe that his vendor has lawful authority to sell, and failing in this, it is no more of a hardship to hold him liable than it is to make the innocent owner lose his property.

§ 253. **Stolen Negotiable Paper.**—The rule does not apply to paper or instruments negotiable by delivery. In such cases, even though the instrument be stolen, one receiving it for value in due course of business may hold it as against the original owner, may recover upon it, and cannot be held for its conversion.² Thus, the defendant had received certain stolen coupons of United States bonds from one who had received them from the thief, and, acting as agent had sold them and turned the proceeds to the one from whom he received the bonds. It was held that the defendant was not liable to the owner in trover for their conversion. In its opinion, the court said: "The coupons do not stand upon the same ground as chattels. They were negotiable promises for the payment of money, issued by the government, payable to bearer and transferable by mere delivery without assignment or indorsement. They are, therefore, not to be considered as goods, but as representatives of money and subject to the same rules as bank bills or other negotiable instruments payable in money to bearer. The rule of *caveat emptor* does not apply to them. It is now well settled that the bearer of a bank bill which has been stolen from the bank may recover the amount from the bank unless it is proved that he did not take it in good faith and for a valuable consideration, and that his knowledge of suspicious circumstances is immaterial unless amounting to proof of want of good faith."³ But it is no defence to an action of trover for property sold by defendant as agent of another that the property was government

¹ *Spooner v. Holmes*, 102 Mass. 503, 3 A. R. 491; citing *Heckel v. Lurvey*, 101 Mass. 344; see *Kramer v. Faulkner*, 9 Mo. App. 35.

² *Worcester Bank v. Dorchester Bank*, 10 Cush. 488, 57 A. D. 120; *Brooklyn Co. v. Bank*, 102 U. S. 40.

³ *Spooner v. Holmes*, 102 Mass. 503, 3 A. R. 491.

bonds or other instruments payable to bearer, if the principal was not a *bona fide* purchaser.¹

§ 254. **Purchaser Acquires no Title from Thief.** — It is universally held that the purchaser of stolen chattels, no matter how innocent or free from negligence in the matter, acquires no title to such property as against the true owner.² And if the purchaser does some act by which the property is converted into money or other property, either by sale, exchange or collection, or intermeddles with it in a manner inconsistent with the owner's rights, he will be held liable to the owner for its value in trover.³ And this is true even where the purchaser has bought in good faith and for value.⁴ The point was made by counsel in an Illinois case that since the statutes of that state provided for an action against one "in whose possession" stolen property might be found, that one who had received such property, but resold it, could not be held for its value. But the court brushed this argument aside, and in holding the defendant liable in trover, remarked: "If the property could have been replevied or been identified in their possession, why should not they be required to account for its value after their act had put it beyond the owner's reach, and the proceeds had gone into the defendant's pockets?"⁵

14. INFANTS

§ 255. **Where Wrong is Non-performance of Contract.** — There are some cases in which, independent of statutory provision, an infant cannot be held liable for torts, though on the same state of facts a person of full age and legal capacity might be. The distinction is this: If the wrong grows out of contractual relations, and the real injury consists in the non-performance of a contract into which the party wronged has entered with an infant, the law will not permit the former to enforce the contract indirectly by counting on the infant's neglect to perform it, or omission of duty under it, as a tort. The reason is obvious: To permit this to be done would deprive the infant of that shield of protection which, in matters of

¹ Kimball v. Billings, 55 Me. 147, 92 A. D. 581.

² Swim v. Wilson, 90 Cal. 126, 27 Pac. 33, 25 A. S. R. 110.

³ Kramer v. Faulkner, 9 Mo. App. 35.

⁴ Knox v. Eden, etc. Co., 148 N. Y. 441, 42 N. E. 988, 31 L. R. A. 779; citing Anderson v. Nicholas, 28 N. Y. 600; Bangor, etc. Co. v. Robinson, 52 Fed. 520; Biddle v. Bayard, 13 Pa. 150; Barstow v. Savings Co., 64 Cal. 388, 1 Pac. 349, 49 A. R. 705. See Morgan v. Hodges, 89 Mich. 404, 15 L. R. A. 44; Courtis v. Cane, 32 Vt. 232, 76 A. D. 174; Sherwood v. Meadow Val. Co., 50 Cal. 412; Bercich v. Marye, 6 Nev. 312; Kidder v. Biddle, 13 Ind. App. 653, 42 N. E. 293; Fort v. Wells, 14 Ind. App. 531, 43 N. E. 155, 25 A. S. R. 316; Robinson v. Skipwith, 23 Ind. 311.

⁵ Sharp v. Parks, 48 Ill. 511, 95 A. D. 565.

contract, the law has wisely placed before him. Therefore, if case be brought against an infant for the immoderate use and want of care of a horse which has been bailed to him, infancy is a good defense; the gravamen of the complaint being merely a breach of the implied contract of bailment. So infancy is a good defense to an action by a ship owner against his super-cargo for a breach of his instructions regarding the sale of the cargo, whereby the same was lost or destroyed.¹

§ 256. **Liability as Bailees.** — But there are cases in which it has been decided that if property has been bailed to an infant for a definite purpose, and he does in respect of it some specific wrongful act not warranted by the bailment, and which would have rendered any other person responsible to the bailor in an action as for a conversion, the infant is also liable to a like action. Thus, it has been held that an infant who hires a horse to go to a place agreed upon, but drives him to another, in a different direction, is liable in trover for a conversion of the horse. Such an action is said not to be founded on the contract and it is not necessary to show the contract in a suit for a conversion.²

¹ Cooley, Torts, 123, citing *Eaton v. Hill*, 50 N. H. 235; *Root v. Stevenson*, 24 Ind. 115; *Vasse v. Smith*, 6 Cranch 126; *Studwell v. Shafter*, 54 N. Y. 249.

² Cooley, Torts, 126, citing *Homer v. Thwing*, 3 Pick. 492; *Fish v. Ferris*, 5 Duer 49; *Woodman v. Hubbard*, 25 N. H. 73; *Towne v. Wiley*, 23 Vt. 355; *Hall v. Corcoran*, 107 Mass. 251; *Schenk v. Strong*, 4 N. J. 87; *Freeman v. Boland*, 14 R. I. 39; *Tucker v. Moreland*, 10 Pet. 58.

CHAPTER V

WHAT ACTS AMOUNT TO A CONVERSION

1. BY WRONGFUL TAKING

- § 257. General statement.
- § 258. Manner of obtaining possession immaterial.
- § 259. Chattels obtained by fraud.
- § 260. Same subject; re-sale of chattels.
- § 261. Chattels obtained under legal process.
- § 262. Same subject; officer must follow commands of writ.
- § 263. Same subject.
- § 264. Same subject; where officer seizes goods of stranger.
- § 265. Same subject; liability of third persons.
- § 266. Same subject.
- § 267. Under chattel mortgages.
- § 268. Conversion as against mortgagor.
- § 269. Intermingling or confusion of goods.
- § 270. Confusion merely rule of evidence.
- § 271. How confusion may occur.
- § 272. When confusion by agreement.
- § 273. Same subject.
- § 274. Where goods wrongfully confused.
- § 275. Rights of owner of goods wrongfully confused.
- § 276. Burden on wrong-doer to identify chattels.
- § 277. Wrong-doer forfeits chattels confused.
- § 278. Where goods may be identified.
- § 279. Motive of wrong-doer immaterial.

- § 280. Rights of third persons in goods confused.
- § 281. Conversion under principle of accession.
- § 282. Same subject; appropriation of chattels in good faith.
- § 283. Same subject.
- § 284. Whether title passes to innocent trespasser.
- § 285. Same subject; remedies of owner.
- § 286. Form or substance changed willfully.
- § 287. Retaking by vendor after sale and delivery.
- § 288. Miscellaneous instances of wrongful taking.

2. BY WRONGFUL SALE

- § 289. Is generally a conversion.
- § 290. Purchaser at wrongful sale guilty of conversion.
- § 291. Sale induced by fraud.

3. ASSUMPTION OF OWNERSHIP OR DOMINION

- § 292. Wrongful dominion over chattels is conversion.
- § 293. Same subject; must be in defiance of owner's rights.
- § 294. What interference sufficient.
- § 295. Same subject; illustrations.
- § 296. Conversion of part, when conversion of whole.
- § 297. Owner of land not compelled to deliver chattels to owner.
- § 298. Actual possession by wrong-doer not always necessary.

4. BY DESTRUCTION OF PROPERTY

- § 299. Destruction is generally a conversion.
- § 300. Illustrations of same subject.
- § 301. Where act necessary to protect property.
- § 302. Intentional destruction of chattels.

5. BY WRONGFUL DELIVERY

- § 303. When amounts to conversion.
- § 304. Re-delivery to one found in possession.
- § 305. Same subject.

6. BY AIDING OR ABETTING A WRONG-DOER

- § 306. Third party may be equally guilty with wrong-doer.
- § 307. Merely permitting act of another is no conversion.

7. BY WRONGFUL USE

- § 308. Is generally a conversion.
- § 309. Illustrations of same subject.
- § 310. Rightful use of chattels is no conversion.

8. BY CLAIMING LIEN

- § 311. Wrongful claim of lien a conversion.
- § 312. No conversion where possession rightful.

9. BY WRONGFUL DETENTION

- § 313. Is generally a conversion.

10. BY WORDS WITHOUT ACTS

- § 314. When overt act unnecessary.
- § 315. Illustrations of same subject.
- § 316. Owner's rights not interfered with.

11. BY NEGLIGENCE

- § 317. Negligence not a conversion.
- § 318. Illustrations of same subject.
- § 319. Same subject.
- § 320. Negligence after conversion no defense.

12. BY MISCELLANEOUS ACTS

- § 321. What sufficient to show conversion.
- § 322. Breach of contract no conversion.

1. BY WRONGFUL TAKING

§ 257. **General Statement.** — With certain enlargement as to detail to be in this chapter presently noted, the acts ordinarily regarded as sufficient to constitute a conversion may be said to come within the purview of one of the following divisions: (1) An unauthorized taking of chattels out of the possession of the owner; (2) an assumption of ownership over chattels in derogation of the rights of the real owner; (3) a mis-use or disposal of the property so as to materially alter it or place it beyond the reach of the owner; and (4) a wrongful detention of it, after a demand from the owner for possession. Thus, it is said that if one take the property of another, for a temporary use only, in disregard of the owner's rights, it is a conversion. Either a wrongful taking, an assumption of ownership, an illegal use or mis-use, or a wrongful detention of chattels, will constitute a conversion.¹ And, while it is the usual rule that

¹ Baltimore, etc. Ry. Co. v. O'Donnell, 49 Ohio St. 489, 32 N. E. 476, 34 A. S. R. 579, 21 L. R. A. 117.

the intention of the wrong-doer is not a necessary ingredient of a conversion, it is generally said that no principle is better settled than that an unlawful taking of goods out of the possession of the owner is itself a conversion, and not merely evidence of it, provided the taking be with the intent to convert the chattels to the use of the taker or some other person.¹ Thus, it has been said that for the purpose of the case at issue it might be conceded that the taking of the property of a person for no other purpose than that of preserving it for his use is not ordinarily such a conversion of it as will subject the taker to an action of trover.²

§ 258. **Manner of Obtaining Possession Immaterial.** — But to render the taker liable in trover, it is immaterial how he obtained possession of the property.³ Thus, where the defendant borrowed of another, money which he knew did not belong to the latter, both were held liable for the conversion of the money.⁴ So, where one surreptitiously drew gas from a pipe line, he was held in trover for its conversion.⁵ And where defendant permitted plaintiff's sheep to become intermingled with his own, then assisted a purchaser of defendant's flock to drive it away with plaintiff's sheep therein, knowing at the time that such purchaser intended to convert them to his own use even though he said he would return and pay for them if any one claimed them, it was held that the defendant was liable to plaintiff in trover.⁶ But of course it is not a conversion to take property of which the taker has the right of possession, whatever may be the method of coming into possession.⁷

§ 259. **Chattels Obtained by Fraud.** — Where a sale of property is induced by the fraud or false representations of the vendee, the vendor may rescind the sale and maintain trover for the value of the chattels. Replevin is a concurrent remedy in such case if the chattels can be found; but on reclaiming the property, the vendor

¹ *Hughes v. Coors*, 3 Col. App. 303, 33 Pac. 77; *Krager v. Pierce*, 73 Ia. 359, 35 N. W. 477; *Marlow v. Rogers*, 102 Ala. 510, 14 So. 790; *Noyes v. Stone*, 163 Mass. 490, 40 N. E. 856; *Johnson v. Walker*, 23 Neb. 736, 37 N. W. 639; *Bartley v. Rogers*, 104 Ill. App. 164; *Allsop v. Machine Works*, 5 Cal. App. 228, 90 Pac. 39; *Oakley v. Randolph*, 54 Kan. 779, 39 Pac. 699; *Ryman v. Gerlach*, 153 Pa. St. 197, 25 Atl. 1031, 26 Atl. 302; *Feury v. McCormick Co.*, 6 S. D. 396, 61 N. W. 162; *Rolfe v. Dudley*, 58 Mich. 208, 24 N. W. 657.

² *Clark v. Whitaker*, 19 Conn. 319, 48 A. D. 160; *Baker v. Kans. City Co.*, 52 Mo. App. 602.

³ *Platt v. Tuttle*, 23 Conn. 233.

⁴ *State v. Omaha Bank*, 59 Neb. 483, 81 N. W. 319; *Rice v. Clark*, 8 Vt. 109.

⁵ *Crystal Ice Co. v. Gas Co.*, 35 Ind. App. 295, 74 N. E. 15.

⁶ *Allen v. McMonagle*, 77 Mo. 478; and see *West Jersey Co. v. Car Works*, 32 N. J. L. 517; *Waverly Co. v. St. Louis*, 112 Mo. 383, 20 S. W. 566; *Norman v. Eckern*, 60 Minn. 531, 63 N. W. 170; *Sadler v. Sadler*, 16 Ark. 628.

⁷ *Conlan v. Latting*, 3 E. D. Smith (N. Y.) 353; *Connah v. Hale*, 23 Wend. 462.

must restore the consideration, if any, received by him.¹ Accordingly, where one exercised undue influence over another mentally incompetent, in order to get possession of chattels of the latter, it was held a conversion for which trover would lie.² However, a person ignorant of the incapacity of another with whom he is dealing, who obtains possession of the latter's personal property, will not be deemed guilty of a conversion simply from his taking possession. But the measure of the rights and liabilities of the parties is different where the incapacity was known to the taker. So, where a purchaser of property knew that the vendor was incapacitated by intoxication at the time of sale, yet took possession of the property and exercised dominion over it, he was held in trover for a conversion of the property.³ And the rule holding a fraudulent vendee for a conversion applies whether title has become vested in him or not.⁴

§ 260. **Same Subject; Re-sale of Chattels.**—Where an actual sale and delivery has taken place through the fraud or false representations of the vendee, and the vendee has resold the chattels to one acting in good faith and without notice of the fraud, it is held that the latter obtains a good title and cannot be held for a conversion, even though the act of his vendor was tortious when he obtained possession of the chattels.⁵ But if the fraudulent vendee has obtained mere possession under such conditions that title has not become vested in him, not only is he guilty of a conversion, but a vendee or assignee claiming through him will be held to the same liability.⁶ This doctrine is based upon the principle that a vendee can acquire no better title than his vendor had, and where a vendor has tortiously obtained possession of another's goods, he gets no title to pass on to a purchaser from him.⁷ The fact that possession of the plaintiff's property was obtained by the fraudulent practices alluded to, and under circumstances which neither divested nor in any manner affected his title, could invest the wrong-doer with no

¹ *Kimball v. Cunningham*, 4 Mass. 502, 3 A. D. 230; *Thurston v. Blanchard*, 22 Pick. 18, 33 A. D. 700 and valuable note thereto; *Heineman v. Steiger*, 54 Mich. 232, 19 N. W. 965; *Thompson v. Rose*, 16 Conn. 71, 41 A. D. 121.

² *Hagar v. Norton*, 188 Mass. 47, 73 N. E. 1073; see *Thomson v. Gortner*, 73 Md. 474, 21 Atl. 371; *Smith v. Zink*, 81 Mo. App. 347.

³ *Baird v. Howard*, 51 Ohio St. 57, 36 N. E. 732, 46 A. S. R. 550, 22 L. R. A. 846; see *Devlin v. Houghton*, 202 Mass. 75, 88 N. E. 580; *Stahl v. Dohrman*, 23 Misc. 461, 51 N. Y. Supp. 396.

⁴ *Lovell v. Hammond, etc. Co.*, 66 Conn. 500, 34 Atl. 511; *Holland v. Bishop*, 60 Minn. 23, 61 N. W. 681.

⁵ *Fawcett v. Osborn*, 32 Ill. 411, 83 A. D. 278.

⁶ *Id.*; *Ashton v. Allen*, 70 N. J. L. 117, 56 Atl. 165.

⁷ *Barker v. Dinsmore*, 72 Pa. St. 427, 13 A. R. 697.

such apparent authority as to enable him by any means to transfer any right or title to another.¹

§ 261. **Chattels Obtained Under Legal Process.**—The speedy administration of justice requires that the mandates of all courts and other tribunals and persons possessing judicial powers should be exercised promptly and without hesitation by those to whom they are directed. To secure this, it is necessary that the law should throw its protecting mantle around those exercising or executing such mandate and hold them harmless so long as they do only what they are commanded to do, without requiring them to determine whether it is rightly and properly commanded or not. Hence arises the principle that a ministerial officer, acting under process fair upon its face, and issuing from a tribunal or person having judicial powers with apparent jurisdiction to issue such process, is justified in obeying it against all illegalities and irregularities except his own.² A ministerial officer is always presumed to be armed with valid process which he can exhibit as his authority. In order to protect him, it must be *fair on its face*; that is, it must appear to be process which the tribunal from which it originated had authority to issue. And the process may be said to be fair on its face when it proceeds from a court, magistrate or body having authority by law to issue process of that nature, and which is legal in form, and on its face contains nothing to notify the officer that it is issued without authority.³ Therefore, it is no conversion for an officer to take possession of chattels under legal process when such process is regularly and properly issued, and he does under it only what he is commanded by it to do.⁴ This is true even though a levy made by him has been withdrawn, or the action subsequently dismissed.⁵ So, where a writ of attachment was based on a defective affidavit, but issued by a court of general jurisdiction, within which were the parties and subject-matter, and the chattels attached were liable to be taken in such suit, the officer was held to be protected by the writ against the claims of a third person.⁶

¹ *Alexander v. Swackhamer*, 105 Ind. 81, 4 N. E. 433, 5 N. E. 908, 55 A. R. 180; *Hudson v. Bauer Co.*, 105 Ala. 200, 16 So. 693; *Gage v. Epperson*, 2 Head. (Tenn.) 669.

² *Freeman's Note* to 21 A. D. 190, citing, *id al.*, *Cooley*, Torts, 459; *Freeman*, Executions, 272; 1 *Waterman on Trespass*, 302.

³ *Cooley on Taxation*, 559, 562. See numerous cases cited in note on page 538, *Cooley*, Torts.

⁴ *Nelson v. Schmoller*, 77 Neb. 717, 110 N. W. 658; *Jenner v. Joliffe*, 9 Johns. 381.

⁵ *Bailey v. Adams*, 14 Wend. 201; *Smith v. Kershaw*, 1 Ga. 259.

⁶ *Matthews v. Densmore*, 109 U. S. 216; see, generally, *Milburn v. Gilman*, 11 Mo. 64; *Erskine v. Hohnbach*, 14 Wall. 613; *Bergin v. Hayward*, 102 Mass. 414.

§ 262. **Same Subject; Officer must Follow Commands of Writ.** — But it is well settled that however regularly issued, or valid in other respects, process may be, it is a protection to the officer acting under it only to the extent that he does exactly what it commands him to do. It will not justify the commission of any irregularity on his part. And it may be broadly stated that an officer, purporting to act under a writ, yet going beyond or outside its mandates, will be held to the same liability as if no such writ had ever been issued and he had committed the act as a private citizen. Thus, however valid the process, or perfect the proceedings leading up to its issue, it will not justify the seizure of the property of the wrong person, nor the wrong property of the right person.¹ For such wrong, he may be sued in trover, as a trespasser, or in such action as the injured party may elect to pursue.² Accordingly, it is held that the taking of chattels under a void writ is a conversion for which the owner may maintain trover.³ While such would not be the case were the process simply irregular.⁴ And an officer will not be protected by process, though valid on its face, if he have notice *aliunde* of some jurisdictional defect which may render the judgment void.⁵

§ 263. **Same Subject.** — “The writ being found to be a lawful one, it next becomes necessary to the officer’s protection that he proceed upon it according as the law directs. He cannot demand and secure the protection of the law while disregarding the commands laid upon him for the protection of the rights of others. By this is not meant that he shall obey to the letter every direction of the law, whether important or unimportant, and whether or not beneficial to any of the parties concerned. Many directions are given in legal proceedings which do not have specially in view the interests of the parties; and where these fail of observance it is generally said of them that they are merely directory. But provisions which are made for the very purpose of protecting individual interests cannot be disregarded with impunity.”⁶ Accordingly, an officer is liable if he sell chattels without the requisite notice,⁷ before the time allowed by law, or in any unauthorized manner,⁸ or by

¹ Freeman, Executions, § 272.

² *Id.*

³ Jones v. Buzzard, 2 Ark. 415; Crawford v. Thompson (Tex. Civ. App.), 117 S. W. 181; Baldwin v. Whittier, 16 Me. 33; Rolfe v. Dudley, 58 Mich. 208, 24 N. W. 657.

⁴ Cogburn v. Spence, 15 Ala. 549, 50 A. D. 140; Keniston v. Little, 30 N. H. 318, 64 A. D. 297.

⁵ Grace v. Mitchell, 31 Wis. 533, 11 A. R. 613; see, *contra*, cases cited in note to 21 A. D. 201.

⁶ Cooley, Torts, 540.

⁷ Blake v. Johnson, 1 N. H. 91.

⁸ Sawyer v. Wilson, 61 Me. 529; Ross v. Philbrick, 39 Me. 29; Wallis v. Truesdell, 6 Pick. 455; Ricketts v. Ungarst, 15 Pa. St. 90, 53 A. D. 572; Pierce v. Evans, 61 Pa. St. 420.

knowingly selling more property than is necessary to satisfy the writ,¹ although it was held in one case that the officer was liable only for the excess,² and in another that he would not be liable if he exercised a reasonable discretion.³

§ 264. **Same Subject; Where Officer Seizes Goods of Stranger.** — In accordance with the foregoing principle, it is the rule that if, acting under a writ whether valid or invalid, an officer seize goods belonging to a stranger to the writ, he is guilty of a conversion and the owner may maintain trover against him.⁴ His liability, however, may depend upon the nature of the process under which he acts; for a distinction is to be taken between the seizure of property of one person upon an execution or attachment against another, and a seizure under a writ of replevin of goods which the officer is specifically commanded to take, though they may in fact belong to a stranger. In the latter case the officer will be protected.⁵ The protection or liability for a wrongful levy of process by an officer inures to or is cast upon his deputies or those called by him to assist.⁶

§ 265. **Same Subject; Liability of Third Persons.** — Liability for a wrongful seizure of property under process may be incurred by one directing, authorizing or ratifying the act of the officer. It is the rule that one who places in the hands of an officer a valid writ, without directing as to the manner of its service, is not liable for the manner of its service; but if he directs or assists the officer in seizing the property not belonging to the debtor, or, a seizure already having been made, if he ratifies a sale of the property by the officer as by receiving the proceeds, he will be held accountable as for a conversion.⁷ In the latter case, he will be regarded as a wrong-doer from the beginning,⁸ and it is held that the fact that he never has the property in his possession, or exercises any dominion over it, is no defense in

¹ *Selkins v. Goodale*, 61 Me. 400.

² *Cone v. Forrest*, 126 Mass. 97.

³ *Jewell v. Swain*, 57 N. H. 506.

⁴ *Westheimer v. State Loan Co.*, 195 Mass. 570, 81 N. E. 289; *Beagle v. Smith*, 50 Neb. 446, 69 N. W. 956; *Seivert v. Galvin*, 133 Wis. 391, 113 N. W. 680; *White v. Ray*, 26 N. C. 14; *Tipton v. Burton*, 58 Mo. 435; *Dixon v. White Co.*, 128 Pa. St. 397, 18 Atl. 502, 15 A. S. R. 683; *McMohan v. Green*, 34 Vt. 69, 80 A. D. 665; *Dethoff v. Gattie*, 103 N. Y. Supp. 589; *Palmer v. Shenkel*, 50 Mo. App. 571; *Schluter v. Jacobs*, 10 Col. 449, 15 Pac. 813.

⁵ *Watson v. Watson*, 9 Conn. 140.

⁶ *Payne v. Green*, 18 Miss. 507; *Goodwine v. Stephens*, 63 Ind. 112; *Jennings v. Carter*, 2 Wend. 446, 20 A. D. 635.

⁷ *Young v. Moore*, 7 J. J. Marsh, 646; *Murray v. Mace*, 41 Neb. 60, 59 N. W. 387, 43 A. S. R. 664; *Draper v. Buxton*, 90 N. C. 182; *Libby v. Soule*, 13 Me. 310; *Phelps v. Delmore*, 69 Hun 18, 23 N. Y. Supp. 229.

⁸ *Taylor v. Ryan*, 15 Neb. 573, 19 N. W. 475; *Hyde v. Cooper*, 26 Vt. 552.

an action of trover, if, as a matter of fact, he is the *causa causans* of the wrongful seizure of a stranger's property.¹

§ 266. **Same Subject.** — "When the plaintiff places his execution in the hands of an officer for service he is presumed to intend that no action shall be taken thereunder not authorized by the terms of the writ. The sheriff may seize the property of a stranger, or do any other unauthorized act, without thereby creating any liability against the plaintiff, because the plaintiff is not presumed to have directed or ratified the illegal proceeding.² But this presumption may be rebutted. The injured party may show that the plaintiff was a co-trespasser with the officer, and may thus make both responsible for their abuse of the writ. Where the plaintiff is present at the levy,³ or advises,⁴ or directs,⁵ it to be made, he is a co-trespasser with the officer."⁶ But the converse of this is also true—a judgment creditor will not be responsible for the wrongful levy or seizure by an officer where he is not present and neither directs nor assents to the levy.⁷

§ 267. **Under Chattel Mortgages.** — Under what circumstances a mortgagee in a chattel mortgage is entitled to sue and recover for a conversion has been treated previously in this work.⁸ It has been shown that, unless otherwise provided by statute, a mortgagee of personal property may maintain an action for conversion against an officer who has levied upon and sold the mortgaged property under an execution against the mortgagor; this being especially true where the officer assumes to sell, against the objection of the mortgagee, the entire property, and not merely the interest of the mortgagor therein.⁹ So, where a statute provided that mortgaged property might be levied on subject to the mortgage and, after making of an inventory, the property should be returned; in a case where the sheriff, with actual notice of an existing mortgage, *prima facie* valid, on a stock of goods, attached the goods at the instance of creditors of the mortgagor who claimed the mortgage was fraudu-

¹ *Hale v. Ames*, 2 T. B. Mon. 143, 15 A. D. 150; see *Sammis v. Ely*, 54 Ohio St. 511, 44 N. E. 508, 56 A. S. R. 731.

² Citing, *id al.*, *Fidler v. Fossard*, 7 Pa. St. 540, 49 A. D. 492; *Marks v. Culimer*, 6 Utah 419, 24 Pac. 528; *Thomas v. Grafton*, 24 W. Va. 282, 12 S. E. 478, 26 A. S. R. 924.

³ Citing *Armstrong v. Dubois*, 1 Abb. App. 8.

⁴ Citing *Canifax v. Chapman*, 7 Mo. 175; *Syndacker v. Brosse*, 51 Ill. 357.

⁵ Citing *Goodyear v. Williston*, 42 Cal. 11; *Wurmser v. Frederick*, 62 Mo. App. 634; *Castile v. Ford*, 53 Neb. 507, 73 N. W. 945.

⁶ *Freeman, Executions*, 273.

⁷ *Russell v. Walker*, 150 Mass. 531, 23 N. E. 383, 15 A. S. R. 239; *Lentz v. Chambers*, 5 Neb. 587, 44 A. D. 63; *Cooley, Torts*, 548; *Adams v. Abbott*, 2 Vt. 383.

⁸ *Ante*, §§ 123 *et seq.*

⁹ *Appleton Mill Co. v. Warder*, 42 Minn. 117, 43 N. W. 791.

lent and void, took and maintained possession in total disregard of the mortgage instead of taking subject to the mortgage, keeping possession only long enough to appraise and inventory the goods and then return them, it was held that such constituted a conversion, and the officer was liable to the mortgagee for the amount of the mortgage.¹

§ 268. **Conversion as Against Mortgagee.** — But the mortgagee may also, under certain conditions, be liable to the mortgagor for a conversion, as well as for third persons who interfere with the rights of the mortgagee to be guilty in trover at the suit of the mortgagee. Thus, where a mortgagee takes and sells or otherwise appropriates property under a chattel mortgage which is for any reason void such action will amount to a conversion and the mortgagee will be liable in trover.² Likewise, where a mortgagee takes possession of and sells the mortgaged property, even though the mortgage be in all respects valid, in any other manner than that provided by law, he will be liable as for a conversion.³ And the same liability attaches where the mortgaged property has been sold upon an execution levied in pursuance of an attachment suit where some provision of the statute had not been complied with;⁴ or where a seizure of the property and sale thereof had taken place after the debt secured by the mortgage had been discharged, or where the seizure is a direct violation of the terms of the mortgage.⁵ Of course a mortgagee, taking property not covered by the mortgage, stands in the same position as any other person, and his act will amount to a conversion; but the mortgagor may have so conducted himself as to be estopped from maintaining trover for such wrongful taking. Thus, where the mortgagor's assignee, knowing that certain chattels of his assignor were covered by a mortgage, neglected to separate from them others not so covered; at a sale under foreclosure, where the property was all sold, another purchaser took it away under the belief that it had all been covered by the mortgage, the assignee was denied a recovery in trover.⁶ The mortgagee must act fairly and in good faith in his dealing with the mortgaged property, and, failing in this, if his wrongful appropriation of the property has prejudiced the rights of the mortgagor, trover will lie against him for the conversion. Thus,

¹ *Norris v. McCanna*, 29 Fed. 757 (Mich.).

² *Miller v. Hannan*, 29 N. Y. App. Div. 178, 51 N. Y. Supp. 816. Of course if the mortgagor consent to the taking of possession, there is no conversion: *Sherman v. Mathews*, 15 Gray 508.

³ *Marchand v. Ronaghan*, 9 Idaho 95, 72 Pac. 731.

⁴ *Sullivan v. Lamb*, 110 Mass. 167.

⁵ *Aylesbury Mer. Co. v. Fitch*, 22 Okla. 475, 99 Pac. 1089, 23 L. R. A. (N. S.) 573.

⁶ *Meyer v. Orynski*, 25 S. W. 655 (Tex. Civ. App.).

where the mortgagee had taken possession of the mortgaged property after a default in payment, and sold it to himself unlawfully, fraudulently and unfairly, and it appeared that he also had a mortgage on land to secure the same debt, and after so disposing of the chattels, he commenced an action to foreclose the mortgage on real estate to recover the balance of the debt claimed to be due, it was held that a purchaser of the land from the mortgagor had an equity to compel the mortgagee to apply the actual value of the chattels on the mortgage-debt; and if the mortgagee by his fraudulent action had permitted the chattels to become scattered so that he could neither return them nor allow a redemption, he was liable for a conversion.¹

§ 269. **Intermingling or Confusion of Goods.** — Where there has been such an intermixture of goods owned by different persons that the property of each can no longer be distinguished, what is denominated a confusion of goods has taken place.² The general rule is that if a person having charge of the property of others so confound it with his own that the line of distinction cannot be traced, all the inconvenience of the confusion is thrown upon him who produces it, and it is for him to distinguish or identify his own property or lose it.³ The doctrine has been well stated thus: If the goods of several intermingled can be easily distinguished and separated, no change of property takes place and each party may lay claim to his own. If the goods are of the same nature and value, although not capable of an actual separation by identifying each particle, if the portion of each owner is known, and a division can be made of equal proportionate value, as in the case of a mixture of corn, coffee, tea, wine or other article of the same kind and quality; then each may claim his aliquot part; but if the mixture is indistinguishable, because a new ingredient is formed, not capable of a just appreciation and division according to the original rights of each, or if the articles mixed are of different values or quantities, and the original values or quantities cannot be determined, the party who occasions, or through whose fault or neglect occurs, the wrongful mixture, must bear the loss.⁴

§ 270. **Confusion merely Rule of Evidence.** — The rule as to the confusion of goods is merely a rule of evidence. The wrongful mingling of one's own goods with those of another, when the question of the identification of the property arises, throws upon the wrongdoer the burden of pointing out his own goods; and if this cannot

¹ *Wygall v. Bigelow*, 42 Kan. 477, 22 Pac. 612.

² *Hesseltine v. Stockwell*, 30 Me. 237, 50 A. D. 627.

³ *Krenzer v. Cooney*, 45 Md. 582.

⁴ *Robinson v. Holt*, 39 N. H. 557, 75 A. D. 233, and numerous cases there cited.

be done, he must bear the loss which results from it. It is but an application of the principle that all things are presumed against the spoliator, that is to say, against one who wrongfully suppresses or destroys evidence.¹

§ 271. **How Confusion may Occur.** — An intermingling of goods of different owners may take place in three general modes. In the first place, such intermingling may arise through accident or mistake. In such case a wrongful act or motive is imputable to neither party, and the doctrine established by the adjudications is that where goods have become so intermingled through accident or mistake as to be indistinguishable, the owners of the goods so mixed become tenants in common of the whole in the proportion that they severally contribute to it.² It therefore follows that after such an intermingling the rules governing the relation of tenants in common apply, and neither person forfeits his rights to his property, and though he may not be able to identify his original property, he may claim, and is entitled to receive, his proportionate part of the entire mixture.³ But if the amount of the entire mixture is insufficient for each to take out the exact quantity he originally contributed, neither will be permitted to take the whole of his property which went into the mixture, but he will be limited to his proportionate share only.⁴ So, if the confusion of the goods is the innocent act of one of the parties, and the resulting mixture is capable of separation, it must still be divided in the proportion in which each contributed, the burden of the division, however, resting on him who caused the confusion; and he must make such division at the risk of losing all to his innocent companion.⁵

§ 272. **When Confusion by Agreement.** — In the next place, a confusion or intermixture of goods may occur through agreement express or implied, or as it is more generally expressed, by consent of the owners. Here, too, it is the general rule that if property of the same kind owned by various persons is so mingled together as to

¹ *Holloway Seed Co. v. Bank*, 92 Tex. 187, 47 S. W. 95, reversing 47 S. W. 77.

² *Keweenaw Assoc. v. O'Neil*, 120 Mich. 270, 79 N. W. 183; *Reid v. King*, 89 Ky. 388, 12 S. W. 772; *Manti, etc. Bank v. Peterson*, 33 Utah 209, 93 Pac. 566, 126 A. S. R. 817; *Horne v. Hanson*, 68 N. H. 201, 44 Atl. 292; *Davis v. Krum*, 12 Mo. App. 279; *The Idaho*, 93 U. S. 575, 23 L. Ed. 978; *Ayre v. Hixon*, 53 Ore. 19, 98 Pac. 515, 133 A. S. R. 819, Ann. Cas. 1913E 659.

³ *Pickering v. Moore*, 67 N. H. 533, 32 Atl. 828, 68 A. S. R. 695, 31 L. R. A. 698; *Brown v. Bacon*, 63 Tex. 598; *Belcher v. Livestock Co.*, 26 Tex. Civ. App. 60, 62 S. W. 924; *Chandler v. De Graff*, 25 Minn. 88; *Gates v. Rifle Boom Co.*, 70 Mich. 309, 38 N. W. 245; *Distilled Spirits*, 11 Wall. 356, 20 L. Ed. 167; *Samuel v. Holbrook Co.*, 156 App. Div. 485, 145 N. Y. S. 275; *Leonard v. Belknap*, 47 Vt. 602; *Bryant v. Ware*, 30 Me. 295.

⁴ *Hance v. Boom Co.*, 70 Mich. 231, 38 N. W. 228.

⁵ *Wright v. Elwood Co.*, 128 Fed. 462.

make the shares of the respective owners indistinguishable, and such mingling is done through the mutual consent of the owners, the relation of tenants in common is thereby created, and the rules governing that relation obtain.¹ This rule finds application most frequently in the storing by various owners of grain in the same warehouse. In the case of such storing it is held that the title of one of the depositors of grain would continue not only while his own grain was actually present in the common store, but as long as any grain remained there, and until he had received it again or otherwise disposed of it, although the identical grain deposited by him was no longer in the common store.²

§ 273. **Same Subject.** — In applying the rule to a case where corn had been stored in a public warehouse, the court said: "The corn having all been intermingled according to the usages of warehousemen, and without objection of the several owners, it became common property owned by all in the proportions in which each had contributed to the common stock. This is so from the very necessity of the case, because so soon as it is intermingled, each person's portion loses its identity, and can no longer be distinguished or separated from the common mass. Neither of the owners could point out, separate, or prove that any particular portion was his. Neither can it be shown when a portion has been lost or misappropriated, whose particular corn it was. It then being owned in common, they are all liable to sustain any loss which may occur by diminution, decay or otherwise, in the same proportion."³

§ 274. **Where Goods Wrongfully Confused.** — It will thus be seen that a discussion of the doctrine of confusion of goods where same has taken place through accident, mistake or consent of the parties, has no place in a treatise dealing with a tort and the action to procure redress therefor, other than to have the general principles announced as a basis for a discussion of the remaining instance of confusion of goods with which I will now deal more in detail. Such third instance arises where goods belonging to different owners are mixed or confused by the wrongful or fraudulent act or default of one of the owners so that the goods form one indistinguishable whole;

¹ *Dole v. Olmstead*, 36 Ill. 150, 85 A. D. 397; *Van Liew v. Van Liew*, 36 N. J. Eq. 637; *Inglebright v. Hammond*, 19 Ohio 337, 53 A. D. 430; *Drudge v. Leiter*, 18 Ind. App. 694, 43 N. E. 34, 63 A. S. R. 359; *Hall v. Pillsbury*, 43 Minn. 33, 44 N. W. 673, 19 A. S. R. 209, 7 L. R. A. 529; *Arthur v. Chicago Co.*, 61 Ia. 648, 17 N. W. 24; *Goodman v. Northcutt*, 14 Ore. 529, 13 Pac. 485; *Mowry v. White*, 21 Wis. 417.

² *Sexton v. Graham*, 23 Ia. 181, 4 N. W. 1090.

³ *Dole v. Olmstead*, 36 Ill. 150, 85 A. D. 397; see *Cushing v. Breed*, 14 Allen (Mass.) 376, 92 A. D. 777; *Jones v. Jackson*, 9 Cal. 245; *Bryan v. Congdon*, 54 Kan. 109, 37 Pac. 1009.

it being noted that the distinguishing feature between this and the other two instances is that here the confusion is produced by the *wrongful* act of one owner, presumably with the intent to deprive the other or others of their property. From an examination of a long list of authorities in which has been involved the question of the liability of one who has wrongfully or fraudulently confused his goods with those of another, I have reached the conclusion that in applying various remedies and announcing various doctrines of liability in such cases, the courts have established a confusion of torts as well as relieved from the effects of a confusion of goods. For it is apparent that under such circumstances replevin, trespass and trover have been applied, if not indiscriminately, at least with such numerical equality among the decisions, as to establish the doctrine that these are concurrent remedies.

§ 275. **Rights of Owner of Goods Wrongfully Confused.** — And it has been said that no one method is adaptable to all such cases. "Although such a term as 'confusion of goods' is generally used, there is, in fact, properly no such doctrine as 'confusion of goods'; there is a fact of confusion of goods, which if committed with a fraudulent motive, subjects the transaction to an inflexible rule, rigorously enforced both at law and in equity, that the wrong-doer shall not profit by nor the innocent party suffer from the wrong. It would be impossible in reaching a righteous result, that any one particular method should be adaptable to the innumerable and complex transactions of the business world, or exactly to all the devices and devious ways of fraud."¹ In the subsequent discussion of this subject, the substantive rights of the parties will be kept in view without special regard to the question whether the courts considered the facts in any particular case as amounting to a conversion, or trespass, or as giving the innocent party the right of replevin.

§ 276. **Burden on Wrong-doer to Identify Chattels.** — The rule of liability in case of a wrongful and willful intermingling of goods, thereby changing their form beyond identification, is one involving a forfeiture; for in such case the wrong-doer must by proof establish and distinguish his own property before he can recover any portion of the mass, and if he cannot do so, he will not be entitled to recover any part of it from the other owners, the latter being entitled to take and keep the whole of the confused goods. This is upon the general principle that when the nature of a wrongful act is such that it not

¹ *Stone v. Oil Co.*, 208 Pa. St. 85, 57 Atl. 183, 101 A. S. R. 904, 65 L. R. A. 218; see *Hawkins v. Spokane Co.*, 3 Idaho 650, 33 Pac. 40.

only inflicts an injury but takes away the means of proving the nature and extent of the loss, the law will aid the remedy against the wrong-doer, and supply the deficiency of proof caused by his misconduct by making every reasonable intendment against him, and in favor of the person whom he has injured. A man who willfully places the property of another in a situation where it cannot be recovered or its true amount or value ascertained, by mixing it with his own, or in any other manner, will consequently be compelled to bear the inconvenience of the uncertainty or confusion which he has produced, even to the extent of surrendering the whole, if his share cannot be distinguished, or in responding in damages for the highest value at which the property in question can be reasonably estimated.¹

§ 277. **Wrong-doer Forfeits Chattels Confused.** — It would thus appear that in cases such as we are considering, the innocent owner has an option to take the whole of the goods or to take the value of his goods which have been so commingled by the wrong-doer with goods of his own as to lose their identity; and, consequently, the wrong-doer is held to a forfeiture of the whole of his goods at the option of the innocent party. But many courts have taken a middle ground upon this question, and, without pronouncing a forfeiture against the wrong-doer, hold that where the identity of a specific article belonging to an innocent party is lost through the wrongful intermingling by another of like goods of his own with such article, the former is entitled to recover from the mass a quantity equal to the amount of his property therein, without identifying any particular article as his original property.² Thus, where a person in filling his contract to deliver a certain number of railroad ties, delivers more than the contract calls for, which the buyer refuses to accept, and, by the act of the seller the surplus ties become so intermingled with those accepted as to be indistinguishable therefrom, the buyer has the right to take and use from the entire mass his proportionate share without restriction in choice to any particular portion of the lot, provided there is no advantage in selection as to quality or value.³ And where wheat has been delivered to a mill and by the mill owner

¹ *Armory v. Delamire*, 1 Smith's Lead. Cas., Pt. 1, 679; *Ryder v. Hathaway*, 21 Pick. 298; *Bailey v. Shaw*, 24 N. H. 297, 55 A. D. 241; *Preston v. Leighton*, 6 Md. 88; *Little Min. Co. v. Little Chief Co.*, 11 Col. 223, 17 Pac. 760, 7 A. S. R. 226.

² *Read v. Middleton*, 62 Ia. 317, 17 N. W. 532; *Blodgett v. Seals*, 78 Miss. 522, 29 So. 852; *Reid v. King*, 89 Ky. 388, 12 S. W. 772; *Nashville Lumber Co. v. Barefield*, 93 Ark. 353, 124 S. W. 758; *Mine, etc. Co. v. White*, 106 Mo. App. 222, 80 S. W. 356; *Clark v. Munroe Co.*, 127 Mich. 300, 86 N. W. 816; *Grimes v. Cannall*, 23 Neb. 187, 39 N. W. 479; *Bent v. Hoxie*, 90 Wis. 625, 64 N. W. 426; *Boaz v. Terrell*, 152 S. W. 300 (Tex.).

³ *Chandler v. De Graff*, 25 Minn. 88.

converted into flour and stored with his own, it has been held that the owner of the wheat is entitled to an amount of the flour equal to that which his wheat probably made.¹

§ 278. **Where Goods may be Identified.** — It will be seen that the doctrine of confusion of goods does not apply where the goods, though intermingled, are still susceptible of identification and separation.² And the disposition of courts never to enforce a forfeiture if the respective rights of the parties can be otherwise protected, has led to another limitation of the rule to the effect that if the goods are of uniform quality or value, so that the mixture is practically homogeneous, the innocent party is not entitled to take the entire mass but only the proportion of the whole which his property contributed thereto. In such cases, the remedy is by division in kind or compensation for actual loss.³ And it has been held that this limitation of the rule will be enforced even in the case of a wrongful and fraudulent intermixture if the goods are of equal value and quality, and the proportion of the whole which each party originally owned is known.⁴ But even in such case, where the party who caused the confusion may be entitled to the benefit of the proportion of the mass which was originally his own, all the inconveniences of the confusion are thrown upon him, and the burden is upon him to prove the proportion which belongs to him as every intendment and presumption is against him.⁵ "Where goods of the same kind and value, belonging to different owners, are intermingled and confused by one owner willfully, but not in bad faith, the other owner does not thereby become the owner of the whole; but when the part of the whole mass belonging to the latter is, by reason of such confusion, made uncertain, every reasonable doubt as to the amount of his share must be resolved in his favor."⁶

§ 279. **Motive of Wrong-doer Immaterial.** — The doctrine of confusion of goods is never enforced beyond the extent that necessity actually requires, and the extreme penalty of forfeiture will never be invoked unless in a case of willful and wrongful invasion of the

¹ First Nat'l Bank v. Scott, 36 Neb. 607, 54 N. W. 987.

² Capron v. Porter, 43 Conn. 383; The Idaho, 93 U. S. 575, 23 L. Ed. 978; Allen v. Kirk, 81 Ia. 668, 47 N. W. 906; Goff v. Brainerd, 58 Vt. 468, 5 Atl. 393; Seymour v. Wyckoff, 10 N. Y. 213; Reiss v. Hanchett, 141 Ill. 419, 31 N. E. 165; McClelland v. McKissick, 143 Ala. 188, 38 So. 1020.

³ Chaffin v. Cont. Co., 85 Ga. 27, 11 S. E. 721; Reid v. King, 89 Ky. 388, 12 S. W. 772; Butte Co. v. Vaughn, 11 Cal. 143, 70 A. D. 769; Jurey v. Hord, 25 La. Ann. 465; Swann-Day Lumber Co. v. Hall, 124 S. W. 826 (Ky.); Wright v. Skinner, 34 Fla. 453, 16 So. 335.

⁴ Hesseltine v. Stockwell, 30 Me. 237, 50 A. D. 627.

⁵ Starr v. Winegar, 3 Hun 491; Lightner v. Lane, 161 Cal. 689, 120 Pac. 771.

⁶ Osborne v. Elevator Co., 62 Minn. 400, 64 N. W. 1135.

property rights of the innocent person.¹ And, while generally the question of intent or motive does not enter into a determination of the liability of a tort-feasor, it has been held that in order to subject himself to liability under the doctrine of confusion of goods, the wrong-doer must have acted not only willfully and fraudulently, but with the intent and for the purpose of preventing an identification of the goods, and consequently of depriving the innocent party of his property.²

§ 280. **Rights of Third Persons in Goods Confused.** — Further, it is held that if the rights of innocent third parties intervene, they must be protected, even if such protection involves the denial of the application of the rule relating to confusion of goods. Thus, it has been held that the rule should not apply in a case where creditors of the person who has caused the confusion have levied upon the goods, that it was sufficient for the indemnity and protection of the party claiming to retake his property that so much of the proceeds of a sale of the property should be adjudged to him as was equal to the price at which he sold the goods to the debtor.³

§ 281. **Conversion Under Principle of Accession.** — It is a general rule that the owner of property, whether such property be movable or immovable, has the right to that which is united with it by accession or adjunction; and in this regard, accession means the union of an accessory thing (either materials or labor) with the principal thing so as to constitute a part and parcel of it.⁴ And the doctrine of accession is analogous to the doctrine of confusion of goods. The right of accession may accrue whenever the materials belonging to several persons are united by labor into a single article; and, in general, the ownership of an article so formed is in the party to whom the principal part of the material belonged.⁵

§ 282. **Same Subject; Appropriation of Chattels in Good Faith.** — The rules of law by which the right of property may be acquired by accession or adjunction were principally derived from the civil law, but have long been sanctioned by the courts of England and this country as principles well established. As stated, the general rule is that the owner of property, whether movable or immovable,

¹ *Wright v. Skinner*, 34 Fla. 453, 16 So. 335; *Wooley v. Campbell*, 37 N. J. L. 169.

² *Treat v. Barber*, 7 Conn. 274; *Swann-Day Co. v. Hall*, 124 S. W. 826 (Ky.); *Gunter v. James*, 9 Cal. 660.

³ Note to *Ayre v. Hixon*, Ann. Cas. 1913E, 669, citing *Erie Co. v. Dial*, 140 Fed. 689, 72 C. C. A. 183; *Smith v. Au Gres Tp.*, 150 Fed. 257, 80 C. C. A. 145, 9 L. R. A. (N. S.) 876.

⁴ *Mather v. Chapman*, 40 Conn. 382, 16 A. R. 46.

⁵ *Pulcifer v. Page*, 32 Me. 404, 54 A. D. 582.

has the right to that which is united with or joined to it by accession or adjunction. But by the law of England, as well as by the civil law, a trespasser, who willfully takes the property of another, can acquire no right in it by the principle of accession, but the owner may reclaim it, whatever alteration of form it may have undergone, unless it be changed into a different species and be incapable of being restored to its former state; and even then the trespasser, by the civil law, could acquire no right by the accession, unless the materials had been taken away in ignorance of their being the property of another.¹ "The doctrine of title by accession is in the common law as old as the law itself, and was previously known in other systems. Its general principles may therefore be assumed to be well settled. A willful trespasser who expends his money or labor upon the property of another, no matter to what extent, will acquire no property therein, but the owner may reclaim it so long as its identity is not changed by conversion into some new product. Indeed, some authorities hold that it may be followed even after its identity is lost in some new product; that grapes may be reclaimed after they have been converted into wine, and grain in the form of distilled liquors.² And while other authorities refuse to go so far, it is on all hands conceded that where the appropriation of the property of another was accidental or through mistake of fact, and labor has in good faith been expended upon it which destroys its identity, or converts it into something substantially different, and the value of the original article is insignificant as compared with the value of the new product, the title of the property in its converted form must be held to pass to the person by whose labor in good faith the change has been wrought, the original owner being permitted, as his remedy, to recover the value of the article as it was before the conversion."³

§ 283. **Same Subject.** — Thus, where a party trespasses upon the lands of another, but in good faith, and takes therefrom, under a supposed right, property upon which he subsequently bestows labor, making the value of the property far greater than the raw material, the trespasser acquires title by accession, and the original owner is limited in his right of recovery to the value of the raw material.⁴ And in an action of trover against the defendant for the value of logs received from the plaintiff, and delivered to parties claiming they had been cut from their lands, it was held that if the plaintiff cut the logs

¹ *Pierce v. Goddard*, 22 Pick. 559, 33 A. D. 765, citing 2 Kent's Com. 362; *Betts v. Lee*, 5 Johns. 348, 4 A. D. 368.

² Citing *Silsbury v. McCoon*, 3 N. Y. 379; *Riddle v. Driver*, 12 Ala. 590.

³ *The Isle, etc. Co. v. Hertin*, 37 Mich. 332, 26 A. R. 523.

⁴ *Murphy v. Sioux City Co.*, 55 Ia. 473, 8 N. W. 320, 39 A. R. 175.

innocently supposing them to have been upon his land, and mixed them with his own so that the logs cut from the land of the third parties could not be identified, then such third parties had the right to select from the common mass a quantity of an average quality with their own, equal to the quantity taken from their lands.¹

§ 284. **Whether Title Passes to Innocent Trespasser.** — It may thus be seen from an examination of the adjudications that there is a sharp conflict among them as to whether one, even though a trespasser, who takes the property of another innocently, can, by changing the species of the property, acquire title so as to prevent the original owner from retaking it so long as he can identify it, and put him to an action of trover to recover the value of the property so taken. On the one hand it is contended that in such case the title passes and the owner can maintain trover for the value of the property converted.² And on the other hand, it is said that the better rule is that the fact that the property has been increased in value by either the labor or materials of the defendant is not sufficient to divest the title of the original owner, nor is the defendant, though honestly mistaken as to his rights, entitled to compensation to the extent of the benefit received by the owner.³ The latter contention has been well set forth thus: "In determining the question of recaption, the law must either allow the owner to retake the property, or it must hold that he has lost the right by the wrongful act of another. If retaken at all, it must be taken as it is found, though enhanced in value by the trespasser. It cannot be returned to its original condition. The law therefore being obliged to say that either the wrongdoer shall lose his labor, or the owner shall lose the right to re-take the property wherever he may find it, very properly decides in favor of the latter. But where the owner voluntarily waives the right to reclaim the property itself, and sues for damages, the difficulty of separating the enhanced value from the original value no longer exists. It is then entirely practicable to give the owner the entire value that was taken from him, which it seems that natural justice requires, without adding to it such value as the property may have afterward acquired from the labor of the defendant. In the case of recaption, the law does not allow it, because it is absolute justice that

¹ *Gates v. Rifle Boom Co.*, 70 Mich. 309, 38 N. W. 245; see *Kimball v. Lohmas*, 31 Cal. 154; *Baker v. Meisch*, 29 Neb. 227, 45 N. W. 685; *Arpin v. Burch*, 68 Wis. 619, 32 N. W. 681; *Lampton v. Preston*, 1 J. J. Marsh, 445, 19 A. D. 104.

² *Hyde v. Cookson*, 21 Barb. 92; *Baker v. Meisch*, *supra*; *Eastman v. Harris*, 4 La. Ann. 193; *Hungerford v. Redford*, 29 Wis. 345.

³ *Strubee v. Trustees*, 78 Ky. 481, 39 A. R. 251; *Busch v. Fisher*, 89 Mich. 192, 50 N. W. 788; *Dunn v. O'Neal*, 1 Sneed 106, 60 A. D. 140.

the original owner should have the additional value. But where the wrong-doer has by his own act created a state of facts when either he or the owner must lose, the law says the wrong-doer shall lose."¹

§ 285. **Same Subject; Remedies of Owner.**—From such considerations it is established that, under like facts, the owner has an election of remedies — he may re-take the property with its increased value, or he may treat the transaction as an appropriation of the property by the defendant to his own use amounting to a conversion, and recover its value in trover.² And in the event he elect to treat the matter as a conversion, and bring his action in trover, there is a contrariety of opinion as to the measure of his recovery.³

§ 286. **Form or Substance Changed Willfully.**—But whatever may be the true rule where the trespasser is innocent of any wrong intent in appropriating the property of another, there is no divergence from the rule that a willful trespasser cannot, by taking the property of another and changing it in substance or form, thereby acquire the title as against the true owner.⁴ Judge Ruggles, in the case of *Silisbury v. McCoons*,⁵ has given very careful attention to this question. In sustaining the rule announced, he makes the following observations: "It is an elementary principle in the law of all civilized communities that a man cannot be deprived of his property except by his own voluntary act or by operation of law. The thief who steals a chattel, or the trespasser who takes it by force, acquires no title by such wrongful taking. The subsequent possession by the thief or the trespasser is a continuing trespass; and if, during its continuance, the wrong-doer enhances the value of the chattel by labor and skill bestowed upon it, as by sawing logs into boards, splitting timber into rails, making leather into shoes or iron into bars, or into a tool, the manufactured article still belongs to the owner of the original material, and he may take it or recover its improved value in an action for damages. And if the wrong-doer sell the chattel to an honest purchaser having no notice of the fraud by which it was acquired, the purchaser obtains no title from the trespasser, because

¹ *Wymouth v. Chicago Co.*, 17 Wis. 550, 84 A. D. 763.

² *Dawson v. Powell*, 9 Bush. 663, 15 A. R. 745; *Nesbitt v. Lumber Co.*, 2 Minn. 491; *Simpkins v. Rogers*, 15 Ill. 397; *Bolles Co. v. U. S.*, 106 U. S. 432, 27 L. Ed. 230; *Ayres v. Hubbard*, 57 Mich. 322, 23 N. W. 829, 58 A. R. 361; *Moody v. Whitney*, 38 Me. 174, 61 A. D. 239; *Thomas v. Moody*, 11 Me. 129.

³ See *post*, Chapter XII, "Measure of Damages."

⁴ *Snyder v. Vaux*, 2 Rawle 423, 21 A. D. 466; *Baker v. Sheeler*, 8 Wend. 508, 24 A. D. 66; *Newton v. Porter*, 69 N. Y. 136, 25 A. R. 152; *Mitchell v. Stetson*, 7 Cush. 435; *Ricketts v. Dorrill*, 55 Ind. 470; *Shoemaker v. Simpson*, 16 Kan. 43; *Stuart v. Phelps*, 39 Ia. 14.

⁵ 3 N. Y. 379, 53 A. D. 307.

the trespasser had none to give. The owner of the original material may still retake it in its improved state, or he may recover its improved value. The right to the improved value in damages is the consequence of the continued ownership. It would be absurd to say that the original owner may retake the thing in its improved state, and yet he may not, if put to his action of trespass or trover, recover its improved value in damages. Thus far, it is conceded that the common law agrees with the civil.

“They agree in another respect, to-wit, that if the chattel wrongfully taken afterward come into the hands of an innocent holder who, believing himself to be the owner, converts the chattel into a thing of different species, so that its identity is destroyed, the original owner cannot reclaim it. Such a change is said to be wrought when wheat is made into bread, olives into oil or grapes into wine. In a case of this kind, the change in the species of the chattel is not an intentional wrong to the original owner. It is therefore regarded as a destruction or consumption of the original materials, and the true owner is not permitted to trace their identity into the manufactured article, for the purpose of appropriating to his own use the labor and skill of the innocent occupant who wrought the change; but he is put to his action for damages as for a thing consumed and may recover its value as it was when the conversion or consumption took place. . . . The acknowledged principle of the civil law is that a willful wrongdoer acquires no property in the goods of another either by the wrongful taking or by any change wrought in them by his own labor or skill, however great that change may be. The new product, in its improved state, belongs to the owner of the original materials, provided it be proved to have been made from them; the trespasser loses his labor, and that change which is regarded as a destruction of the goods, or an alteration of their identity, in favor of an honest possessor, is not so regarded as between the original owner and a willful violator of his right of property. . . . So long as property wrongfully taken retains its original form and substance, or may be reduced to its original materials, it belongs, according to the admitted principles of the common law, to the original owner, without regard to the degree of improvement, or the additional value given to it by the labor of the wrong-doer. Nay more: This rule holds good against an innocent purchaser from the wrong-doer, although its value is increased an hundred fold by the labor of the purchaser. This is a necessary consequence of the continuance of the original ownership.

“There is no satisfactory reason why the wrongful conversion of

the original materials into an article of a different name or a different species should work a transfer of the title from the true owner to the trespasser, provided the real identity of the thing can be traced by evidence. The difficulty of proving the identity is not a good reason. It relates merely to the convenience of the remedy and not at all to the right. In all cases where the new product cannot be identified by mere inspection, the original material must be traced by the testimony of witnesses from hand to hand through the process of transformation."¹ The application of the law of Conversion may be made to such cases for the reason that by his act the wrong-doer interferes with and exercises dominion over the owner's property in derogation of his rights, and appropriates such property to his own use; and, while the owner has the right to replevy the property, if it can be in any way identified, he also has the right to sue in trespass, and the further right to consider the transaction a conversion by the wrong-doer, and sue in trover for the value of the property.

§ 287. **Retaking by Vendor After Sale and Delivery.** — A complete sale of goods may be had by a delivery upon the credit of the vendee as well as where the latter has paid cash. The form of payment is immaterial to the completion of the sale so long as it is the one agreed upon by the parties; so that in theory the acceptance of the credit or promise of the vendee in payment is sufficient to pass title to the property. Therefore, delivery of the property having been made by the vendor, he agreeing to look solely to the credit of the vendee, the right of possession is in the latter and with this possession the vendor has no right to interfere; and if the latter re-takes possession of the property without legal process or the vendee's consent, he will be held in the same light as if he had never owned the goods or had them in his possession, and his act will amount to a conversion of them.² And this is true even in conditional sales if, after the retaking, the vendor sells the goods at private sale when a statute requires a public one;³ but in such case the conversion consists in the unlawful sale rather than in the re-taking; it being the general rule that if the sale be conditional and the buyer in default, the vendor is not liable for a conversion where he retakes the goods,⁴

¹ See *Ryder v. Hathaway*, 21 Pick. 304; *Wingate v. Smith*, 20 Me. 287; *Willard v. Rice*, 11 Metc. (Mass.) 493, 45 A. D. 226; *Kinsey v. Leggett*, 71 N. Y. 395; *Clement v. Duffy*, 54 Ia. 635, 7 N. W. 85; *Brock v. Smith*, 14 Ark. 431; *Freeman v. Underwood*, 66 Me. 229.

² *Huelet v. Reyus*, 1 Abb. Pr. N. S. 27 (N. Y.).

³ *Smith v. Wood*, 63 Vt. 534, 22 Atl. 575.

⁴ *Owens v. Weedman*, 82 Ill. 409; *Fitch v. Beach*, 15 Wend. 221; see *Dunning v. Northrup*, 6 N. Y. St. 326.

especially if his contract authorized such re-taking if he deemed himself insecure.¹

§ 288. **Miscellaneous Instances of Wrongful Taking.** — It is not necessary that property be taken from one entitled to its possession willfully and corruptly in order to render the taker liable for its conversion.² In fact, one is liable for a conversion who takes goods from their owner under a mistaken belief of his right.³ So, if a person in good faith, and with the intention of purchasing, receives property from one who is not the owner, and, being informed of the ownership, returns the property to the one from whom he received it, he will be held liable for its value in trover.⁴ And if the defendant received property under an illegal contract and refused to pay for it, he may be held in trover.⁵ So, where in the sale of goods payment by the vendee was to be concurrent with the delivery by the vendor, the vendee who received the goods and refused to pay for them thereby was held to have obtained possession wrongfully and could be sued in trover for their value.⁶ Plaintiff had delivered his watch to a person who agreed to pay for it if he kept it. Before either paying for it or returning it, the conditional vendee died; his widow, as administratrix of his estate, included the watch in the inventory of assets and received the watch as a part of her allowance under decree of court, and sold it to the defendant. The plaintiff, bringing an action of trover, was held not to have lost title, and the action was sustained.⁷ And in an action of replevin, where the defendant prevailed and the plaintiff failed to return the property, it was held that the defendant's remedy on the replevin bond was not exclusive,⁸ and that he might maintain trover against the plaintiff.⁹

2. BY WRONGFUL SALE

§ 289. **Is Generally a Conversion.** — Instances of wrongful sales of personalty as constituting a conversion have been discussed in

¹ McClelland v. Nichols, 24 Minn. 176; see Sutton v. McCoy, 2 Ga. App. 758, 59 S. E. 21.

² Haddix v. Einstman, 14 Ill. App. 443.

³ Murphy v. Hobbs, 8 Col. 17.

⁴ Rembaugh v. Phipps, 75 Mo. 422. It would have been otherwise had he so returned the property prior to notice of the true ownership. Bolling v. Kirby, 90 Ala. 215, 7 So. 914, 24 A. S. R. 789.

⁵ Strauss v. Schwab, 104 Ala. 669, 16 So. 692; Harris v. Staples, 89 S. W. 801 (Tex. Civ. App.). But the action cannot be maintained if one founded on the illegal contract is pending: Kimball v. Cunningham, 4 Mass. 502, 3 A. D. 230.

⁶ Lamb v. Utley, 146 Mich. 654, 110 N. W. 50.

⁷ Jillson v. Wilbur, 41 N. H. 106.

⁸ Dawson v. Sparks, 77 Ind. 88; Wyman v. Bowman, 71 Me. 121; Smith v. Demarais, 39 Mich. 14; see Rocky v. Burkhalter, 68 Pa. St. 221.

⁹ Asher v. Reizenstein, 105 N. C. 213, 10 S. E. 889.

previous sub-divisions of this volume.¹ From there it appeared that an improper sale is one of the commonest illustrations of dominion exerted over property by an unauthorized person sufficient to render him liable in trover; and, generally it may be said that every sale of personal property absolutely constitutes a conversion if made without title or authority from the person in whom the true title is vested.² Thus, where a draft with bill of lading attached was sent to the defendant bank with instructions to notify the shipper if the draft was not paid by the consignee, and the bank sold the consigned goods to a third person without notice to the shipper, the bank was held guilty of a conversion.³ So, where plaintiff had delivered certain livestock to defendant in pasture, with authority to sell enough of them to pay for their keep, the defendant was held liable for a conversion where he sold more than enough to pay for the pasturage.⁴

§ 290. **Purchaser at Wrongful Sale Guilty of Conversion.** — In the event of such wrongful sale, the purchaser gets no title, since no man can be deprived of his property without due process of law or his own consent, and the seller, having no title, confers none on his vendee; so that it is held that the purchaser is guilty of a conversion equally with the vendor,⁵ whether or not he had knowledge of the true title;⁶ for it is the rule that mere possession of goods by a person affords no evidence of ownership or authority to sell it, and a person who buys it from him without ascertaining the condition of the title does so at his own peril and, however honestly mistaken, he will be liable to the true owner in trover for a conversion of the property unless the latter has clothed the vendor with such *indicia* of ownership as would work an estoppel against him to say that such vendor had no authority to sell.⁷ Such is likewise the rule where property is sold on condition that title shall not pass till the purchase-price

¹ *Ante*: §§ 44, 124, 208, 263.

² *Gilman v. Hill*, 36 N. H. 311; *Hutchins v. King*, 1 Wall. 53, 17 L. Ed. 544; *Joyce v. Saye B. Co.*, 206 Mass. 9, 91 N. E. 996; *Caldwell v. Ryan*, 210 Mo. 17, 108 S. W. 533; *Webber v. Davis*, 44 Me. 147; *Ivers Co. v. Allen*, 101 Me. 218, 63 Atl. 735, 115 A. S. R. 307; *Duncan v. Stone*, 45 Vt. 118; *Howard v. Seattle Bank*, 10 Wash. 280, 38 Pac. 1040, 39 Pac. 100.

³ *Gregg v. Bank*, 72 S. C. 458, 52 S. E. 195, 110 A. S. R. 633; see *Colby v. Kimball Co.*, 99 Ia. 321, 68 N. W. 786; *Owen v. Long*, 97 Wis. 78, 72 N. W. 364.

⁴ *Whitlock v. Heard*, 13 Ala. 776, 48 A. D. 73; see *Bryant v. Kenyon*, 123 Mich. 151, 81 N. W. 1093; *Thomas v. Sternheimer*, 29 Md. 268; *Barwick v. Rackley*, 46 Ala. 402.

⁵ *Clark v. Wells*, 45 Vt. 4, 12 A. R. 187; *Clark v. Rideout*, 39 N. H. 238; *Carter v. Kingman*, 103 Mass. 517.

⁶ *Dixon v. Caldwell*, 15 Ohio St. 412; *Johnson v. Powers*, 40 Vt. 611; *West Jersey Co. v. Trenton Co.*, 32 N. J. L. 517; *Tallman v. Turck*, 26 Barb. 567; *Freeman v. Underwood*, 66 Me. 229.

⁷ *Gilmore v. Newton*, 9 Allen (Mass.) 171; *Williams v. Merle*, 11 Wend. 80, 25 A. D. 604, and note.

is paid, and a purchaser from the conditional vendee, prior to payment of all of such purchase-price, may be held for a conversion of the property.¹

§ 291. **Sale Induced by Fraud.** — Trover is the proper remedy where an owner of property has been induced to sell it and thus be deprived of it through the fraud of another. The rule is that fraud vitiates all contracts, therefore, if one acquires property through fraud or false representation, no title passes to him, and the owner may pursue the property or he may have an action of trover for its value, even against a subsequent purchaser of it. But where there is an absolute sale, but which is voidable between the vendor and vendee because of fraud in its inception, the vendor can rescind the sale and either recover the property from the vendee, or have judgment in trover for its value;² yet as it is the rule that where a person has *any* title to the property he can convey the entire interest to an innocent purchaser, for value, as against the original vendor, consequently, as a vendee of goods fraudulently purchased acquires a title which is good until defeated by a rescission of the contract of sale, it follows that a purchaser from him, who is ignorant of his fraud, is protected as against the original vendor from an action of trover for a conversion of the goods, or from any possessory action.³ An owner of property who has sold it, but subsequently by a re-sale deprives the purchaser of it, stands in the position of a stranger to the property who had committed a like act, since title has passed from him, and his act amounts to a conversion as against the first purchaser, and if the second vendee has in turn sold the property and converted the proceeds to his own use, he will also be liable in an action of trover.⁴ Another instance of a conversion by sale, is in the case of an unlawful sale to satisfy a lien. Thus, a carrier of flour had a lien on it for transportation charges, but no agreement and no statutory right to sell the flour and pay the charges. Not being able to readily find the owner or collect the charges, the carrier sold the flour. In an action of trover by the owner for a conversion of the flour, the court held that the sale not having been made by authority of law or consent of the owner, the carrier was liable.⁵

¹ *Fisk v. Ewen*, 46 N. H. 173; *Wesoloski v. Stone*, 45 Vt. 118; *Johnstone v. Whittemore*, 27 Mich. 463; *Clark v. Wells*, 45 Vt. 4, 12 A. R. 187.

² *Hall v. Naylor*, 18 N. Y. 588; *Ayres v. French*, 41 Conn. 142.

³ *Williamson v. Russell*, 38 Conn. 406; *Ditson v. Randall*, 33 Me. 202; *Willoughby v. Moulton*, 47 N. H. 207; *Titcombe v. Wood*, 38 Me. 561.

⁴ *Green v. Bennett*, 23 Mich. 464; *Caywood v. Van Ness*, 74 Hun 28, 145 N. Y. 600, 40 N. E. 163; *Northwestern Bank v. Silberman*, 154 Fed. 809, 83 C. C. A. 525.

⁵ *Briggs v. Boston Co.*, 6 Allen (Mass.) 246, 83 A. D. 626; see generally on sales as a conversion *Holden v. Gilfeather*, 78 Vt. 405, 63 Atl. 144; *Worsham v. Vigual*, 14 Tex.

3. ASSUMPTION OF OWNERSHIP OR DOMINION

§ 292. **Wrongful Dominion over Chattels is Conversion.** — It is established by well-settled principles and a long line of decisions, that any distinct act of dominion wrongfully exerted over property, in denial of the owner's right or inconsistent with it, amounts to a conversion. It is not necessary to a conversion that it be shown that the wrong-doer has applied the property to his own use. If he has exercised a dominion over it, in exclusion or in defiance of or inconsistent with the owner's right, that, in law, is a conversion, whether it be for his own or another's use.¹ Therefore, conversion is established where it is shown that the defendant claimed the property as his own and attempted to dispose of it for his own benefit,² under the principle that any unauthorized assumption of ownership over the personal property of another, and of the right to dispose of it, is a conversion for which trover may be maintained.³ Thus, where a pledgee of personal property renounced the relation of pledgee, so notified the pledgor, claimed the property as his own, and afterward sold the property, such facts were held to establish a conversion.⁴ So, where a person, for accommodation indorsed a note for a special purpose and the makers, instead of using it for the intended purpose, transferred it to a creditor for an antecedent debt, the creditor again transferring it before maturity to a *bona fide* holder who collected it from the indorser — it was held that the indorser could maintain trover against the antecedent creditor, as his transfer without authority was a conversion.⁵

§ 293. **Same Subject; Must be in Defiance of Owner's Rights.** — In order to constitute a conversion it is not essential that the defendant should have the complete manucaption of the property. Any intermeddling with or dominion over the property of another, whether by the defendant alone or in conjunction with others, which is subversive of the dominion of the true owner and in denial of his rights by a possession either actual or constructive as deprives the

Civ. App. 324, 37 S. W. 17; *Leuthold v. Fairchild*, 35 Minn. 99, 27 N. W. 503, 28 N. W. 218; *Walker v. Bank*, 43 Ore. 102, 72 Pac. 635; *Lewis v. Metcalf*, 53 Kan. 217, 36 Pac. 345; *Gaertner v. West. E. Co.*, 104 Minn. 467, 116 N. W. 945.

¹ *McPheters v. Page*, 83 Me. 234, 23 A. S. R. 772, citing *Cooley*, Torts, 448; *Webber v. Davis*, 44 Me. 147, 69 A. D. 87; *Fewald v. Chase*, 37 Me. 289.

² *Dickey v. Franklin Bank*, 32 Me. 572; *Hartford Ice Co. v. Greenwoods Co.*, 61 Conn. 166, 23 Atl. 91, 29 A. S. R. 189; *Oakley v. Randolph*, 54 Kan. 779, 39 Pac. 699.

³ *Ramsby v. Beezley*, 11 Ore. 49, 8 Pac. 288; *Adams v. Mizell*, 11 Ga. 106; *Allen v. McMonagle*, 77 Mo. 478; *Meixell v. Kirkpatrick*, 33 Kan. 282, 6 Pac. 241; *Dodge v. Meyer*, 61 Cal. 405.

⁴ *Lowe v. Ozmun*, 3 Cal. App. 387, 86 Pac. 729.

⁵ *Comstock v. Hier*, 73 N. Y. 269.

latter of his dominion for any purpose, is a conversion for which trover will lie.¹ Conversion, to sustain trover, must be a destruction of the plaintiff's property, or some interference with his use, enjoyment or dominion over it; an appropriation of it by defendant to his own use or the use of another, in disregard or defiance of the owner's right, or withholding possession under a claim of title inconsistent with the title of the true owner.² The very act of assuming to one's self the title and right of disposing of the property of another is a conversion, as where property intrusted to a person to sell for the account of the owner was delivered by the former to his own creditor in payment of a pre-existing debt, such facts were held sufficient for a recovery in trover by the owner.³ So, the unauthorized transfer of bills and notes by a corporation's secretary is a conversion by him,⁴ as also is the wrongful entering upon another's premises and taking property left thereon for a third person.⁵ But it must appear that the defendant has exercised some act of dominion or control over the property in controversy inconsistent with or in defiance of plaintiff's rights therein.⁶ But such facts being established, and in the absence of a ratification or waiver, a recovery in trover is inevitable.⁷

§ 294. **What Interference Sufficient.** — If a person has the property of another upon his premises, and forbids its removal, as where machinery belonging to one is in a building belonging to another, he is chargeable for a conversion of the property because the defendant, being the owner of the premises, the plaintiff had no right to enter thereon against his positive order to the contrary. Besides, the courts hold that a very slight interference with or control over the property of another, to the exclusion of the owner, amounts to a conversion. But in such a case, if it does not appear that the defendant has personally in any way intermeddled with the property, and the refusal relied on to establish a conversion was given by an agent in answer to a demand which embraced property not belonging to plaintiff, it is for the jury to say whether this is such a clear refusal to

¹ *Connah v. Hale*, 23 Wend. 462; *Bolling v. Kirby*, 90 Ala. 215, 7 So. 914, 24 A. S. R. 789.

² *Bolling v. Kirby*, *supra*.

³ *Rodick v. Coburn*, 68 Me. 170; *Birdsall v. Davenport*, 43 Hun 552.

⁴ *Firemans Insurance Co. v. Cochran*, 27 Ala. 228.

⁵ *Boutwell v. Harriman*, 58 Vt. 516, 2 Atl. 159.

⁶ *Walker v. Bank*, 43 Ore. 102, 72 Pac. 635.

⁷ *Allsopp v. Hendy M. Works*, 5 Cal. App. 228, 90 Pac. 39; *Moret v. Mason*, 106 Mich. 340, 64 N. W. 193; *Glass v. Basin Co.*, 31 Mont. 21, 77 Pac. 302; *Merz v. Croxen*, 102 Minn. 69, 112 N. W. 890; *Nelson v. Schmoller*, 77 Neb. 717, 110 N. W. 658; *Himmelman v. Des Moines Co.*, 132 Ia. 668, 110 N. W. 155; *Gilbert v. Walker*, 64 Conn. 390, 30 Atl. 132.

deliver the property to which the plaintiff was entitled as to amount to a conversion.¹ Thus, where a tenant has erected buildings on the land under such conditions that he is entitled to take them away at the expiration of the lease, the landlord is guilty of conversion if he refuses to permit their removal,² as also where the landlord procures an injunction against their removal during the life of the lease and before the dissolution of the injunction sells the land with the buildings thereon.³

§ 295. Same Subject; Illustrations. — Where the defendant prohibited plaintiff from going upon the former's premises and taking away a quantity of cord-wood thereon which the defendant claimed as his own, this was held to amount to a conversion of the wood.⁴ And where the facts were that plaintiff had a number of logs lying upon defendant's land, and when he attempted to remove them, the defendant forbade him doing so and threatened to sue him if he did remove them, and afterward sold the logs as his own — such amounted to a very strong case of conversion.⁵ So, where the owner of a store left it in charge of a person with authority to sell in the ordinary course of trade but in no other manner, and during his absence such person turned over the stock of goods to an alleged creditor of the owner, who took charge, sold out the stock and closed the store, it was held that such presented a proper case for recovery by the owner in trover.⁶ And where a consignee had authority to sell the property consigned to him for the true owner, but sold it as the property of another, it was held a conversion.⁷ If a person enters upon the land of another without authority and raises and removes crops, he may be recovered against by the owner of the land as for a conversion of the crops.⁸ So, where a farm owner was forcibly ousted from possession by one who then leased the farm to the defendant who thereupon entered into possession and raised a crop, it was held that the farm owner could recover in trover against the tenant for a conversion of the crop after he had regained possession in ejectment.⁹

§ 296. Conversion of Part, when Conversion of Whole. — The conversion of a portion of chattels in a mass amounts to a conversion

¹ *Farrar v. Chauffetete*, 5 Denio 527; *Delano v. Curtis*, 7 Allen (Mass.) 470.

² *Pullen v. Bell*, 40 Me. 314; *Dame v. Dame*, 38 N. H. 429; *Davis v. Taylor*, 41 Ill. 405; *Overton v. Williston*, 31 Pa. St. 155.

³ *Bircher v. Parker*, 43 Mo. 443.

⁴ *Woodis v. Jordan*, 62 Me. 490. —

⁵ *Sherman v. Way*, 56 Barb. 188.

⁶ *Bane v. Detrick*, 52 Ill. 19.

⁷ *Covell v. Hill*, 6 N. Y. 374.

⁸ *Simpkins v. Rogers*, 15 Ill. 397.

⁹ *Thomas v. Moody*, 11 Me. 139.

of the whole where the unity is thereby destroyed or the use or value of the property with which it is connected is impaired, or there is by the conversion of such part a purpose manifested to control or dispose of or exercise dominion over the whole.¹ Thus, the defendant sent for the plaintiff to do his threshing, and the plaintiff brought his machine to defendant's premises on borrowed wheels; the defendant claimed the wheels as his own, but said that plaintiff might take away his machine; the plaintiff declined to take away the machine without the wheels, and in an action by him for a conversion it was held that the claiming of the wheels and refusing to permit them to be moved was a conversion of the machine as well as the wheels.²

§ 297. Owner of Land not Compelled to Deliver Chattels to Owner. — But the owner of land upon which another has personal property is not in duty bound to deliver the chattels to their owner; and, so long as he does not claim them as his own, or exercise any authority or control over them derogatory of the title of the owner, or forbid or prevent the owner from taking them away, he cannot be held in trover for a conversion by merely failing to deliver them to the owner.³ Thus, where a lot of heavy machinery was attached by an officer in the shop where they had been used and left with the defendant with the understanding that he could use them, and the officer afterward, near the shop, demanded possession of the property and the defendant offered to go to the shop and deliver the property to him there, but the officer did not go and did not direct a delivery to be made at any other place — under such circumstances and in an action of trover against the defendant, it was held that he was not guilty of a conversion.⁴

§ 298. Actual Possession by Wrong-doer not Always Necessary. — It is but a reiteration to say that in order to constitute a conversion it is not necessary that the one charged with the tort should have had the actual manual possession of the property, either at the time of the conversion or at the time the action is brought, it being sufficient if he has assumed such control over the property by a possession, either actual or constructive, as deprives the owner of his dominion over or enjoyment of the property.⁵ Yet the one charged with a conversion, it is held, must have had at least a con-

¹ *Gentry v. Madden*, 3 Ark. 127; *Brown v. Ela*, 67 N. H. 110, 30 Atl. 412.

² *Bowen v. Fenner*, 40 Barb. 383.

³ *Poor v. Dunkman*, 102 Mass. 309.

⁴ *Durgin v. Gage*, 40 N. H. 302.

⁵ *Hall v. Amos*, 5 T. B. Mon. 89, 17 A. D. 42; *Williams v. Fethers*, 115 Wis. 314, 91 N. W. 676; *Bristol v. Burt*, 7 Johns. 254 (N. Y.); *Zachary v. Pace*, 9 Ark. 212.

structive possession of the property at the time of the alleged conversion or he will not be held liable in trover,¹ and this rule has been applied even where the defendant forcibly interposed obstacles in order to prevent the owner from obtaining possession of his property;² although, on the other hand, it is said that although the defendant had put no obstacles in the way of the removal of the goods by the owner, yet had exercised a dominion over them and threatened to sue the owner if he took them away, he will be guilty of a conversion,³ as also if he should refuse to deliver the goods or allow the owner to remove them.⁴ However, if the defendant had simply asked time to ascertain whether he should deliver the goods or allow the owner to take them, and neither refused nor assented to their removal, he could not be held as for a conversion unless he waited an unreasonable length of time in making up his mind what to do.⁵ Evidence merely that the defendant withstood the efforts of plaintiff to obtain possession of his property and prevented him by force from so doing, but it did not appear that he had possession, either actual or constructive, or that he had wrongfully withheld or claimed it, was insufficient to establish a conversion.⁶ So, in an attachment suit an officer merely declared that he attached certain property, but there was no further act of taking possession or exercising dominion by him; in a suit against him for a conversion of the property it was held that the showing was insufficient and that his declaration was merely a claim of special property less than a claim of ownership.⁷ And it is said that mere interference with the property of another is insufficient to constitute a conversion, even though it may be injurious to the owner, if the circumstances show that the owner's right is unquestioned.⁸

4. BY DESTRUCTION OF PROPERTY

§ 299. **Destruction is Generally a Conversion.** — Generally, it may be said that he who willfully or wrongfully destroys or damages the chattels of another so that they are no longer available to the use of the owner in their original state, is guilty of a conver-

¹ *Heighes v. Lumber Co.*, 113 Mich. 518, 71 N. W. 870; *Dozier v. Pilot*, 79 Tex. 224, 14 S. W. 1027; *Merchants Bank v. Seaboard Company*, 130 Ga. 224, 60 S. E. 571; *Forth v. Pursley*, 82 Ill. 152.

² *Boobier v. Boobier*, 39 Me. 406.

³ *Hare v. Pearson*, 4 Ired. 76.

⁴ *Morris v. Thompson*, 1 Rich. 65 (S. C.).

⁵ *Carrol v. Mix*, 51 Barb. 212; *Blankenship v. Berry*, 28 Tex. 448.

⁶ *Boobier v. Boobier*, *supra*.

⁷ *Fernald v. Chase*, 39 Me. 289; see *Parker v. Middlebrook*, 24 Conn. 207.

⁸ *Port Huron Co. v. Engine Works*, 89 Minn. 393, 94 N. W. 1088; *Berman v. Kling*, 81 Conn. 403, 71 Atl. 507; *State v. Staed*, 72 Mo. App. 581.

sion.¹ But an unintentional or negligent act resulting in the destruction or serious injury of the chattels is not enough to sustain trover as for a conversion; the act must have been done with the intention of so disposing of the property as to render it unfit for the owner's use, and must, in fact, have deprived him of his property. Thus, trover will not lie for the accidental destruction of property intrusted to the possession of one not their owner. If the destruction merely resulted from the doing of an act which the defendant had the right to do, and without any intention on his part needlessly or wantonly to destroy the property, he cannot be charged with a conversion. Thus, if a person leaves a wagon standing on my premises without my consent, and I draw it out upon the highway and leave it standing there, and it is stolen, I am not guilty of a conversion of the wagon, for I had a right to remove it from my premises, and even though it was destroyed unintentionally while being removed by me, the rule is not changed. So, where a person left timber lying on the premises of another, who while engaged in digging a pit for a saw-mill, cut through the timbers and left them lying there, and they were accidentally washed into the river and lost, it was held that the owner of the premises was not liable for a conversion.²

§ 300. **Illustrations of Same Subject.** — In an action for the conversion of three drafts, it appeared that the drafts had been transmitted to the defendant for acceptance and payment, and while in his possession he failed and made an assignment of his property. On the day of the assignment the plaintiff's agent demanded the drafts. He replied that he thought he had returned them to plaintiff. Upon reflection and examination he stated that he could not find them, and that he might have burned them in destroying other papers that he considered of no value. It was not pretended that the defendant asserted any title to the bills or claimed any right to hold or retain them. The trial court held these facts a conversion and sustained the action of trover. But the appellate court in reversing the judgment, said: "To authorize the action of trover, two things are necessary: 1. Property in the plaintiff with the right of possession; and, 2. A conversion by the defendant of the thing to his own use. This conversion consists of the appropriation of the thing to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it in defiance of the plaintiff's rights, or in withholding it under a claim of title. The

¹ *Duff v. Bailey*, 29 Ky. L. Rep. 919, 96 S. W. 577; *Simmons v. Eikes*, 24 N. C. 98.

² 6 *Wait's Actions & Defenses*, 180; see *Plumer v. Brown*, 8 Metc. (Mass.) 578; *Meise v. Wachtel*, 54 Misc. 549, 104 N. Y. Supp. 915.

destruction referred to as constituting a conversion is an intentional destruction, not an accidental act. The accidental destruction of an article by one lawfully in its possession has never been held to be a conversion. . . . Demand and refusal do not establish a conversion to the defendant's own use where, as in this case, it appears that at the time of the demand the bills were not in existence. They had been previously and accidentally destroyed. The failure to deliver that which is not in being and cannot be delivered, furnishes no evidence of an appropriation by the defendant. . . . Upon all the authorities I have been able to consult, my judgment is that there was no evidence of a conversion of these bills. There was never any denial of the plaintiff's property; there was no claim of property in the defendant; there is no evidence of a voluntary or intentional destruction of them."¹

§ 301. **Where Act Necessary to Protect Property.** — And a person is not liable in trover for interference with the property of another where such interference was necessary to the proper use or protection of the property of such person, even though the result was a total loss or destruction of the property of such other. Thus, a raftman had moored his raft loaded with timber in such a position that it deprived a wharf-owner of access to his wharf. The latter cut loose the raft and it floated down the river and the timbers were lost. In an action against him it was held that he was not liable for damages, since he had done nothing more than he had a right to do.² Neither is one liable for a conversion where he has destroyed personal property in pursuance of public necessity or in promotion of the public health or safety.³ Thus, the city of Mobile was sued in trover for the conversion of an animal which had been killed by the city's health officer under the claim that the animal was affected with a dangerous disease. It was held that the action would not lie if the defense were properly pleaded, but in the case at bar, the appellate court held that the trial court should have instructed the jury in favor of plaintiff.⁴ So, it is said that trover is never established by proof that property intrusted to defendant has been destroyed, damaged or materially lessened in value through the mere negligence or non-feasance of the defendant.⁵

¹ Salt Springs Bank v. Wheeler, 48 N. Y. 492, 8 A. R. 564.

² Harrington v. Edwards, 17 Wis. 586, 84 A. D. 768.

³ See Municipal Corporations, *ante*, §§ 153 *et seq.*

⁴ Barrett v. Mobile, 129 Ala. 179, 30 So. 36, 87 A. S. R. 54; see A. T. & S. F. Co. v. Tanner, 19 Col. 559, 36 Pac. 541; Ascherman v. Brewing Co., 45 Wis. 262; McKeesport Company v. Penn Company, 122 Fed. 184.

⁵ Tinker v. Morrill, 39 Vt. 477, 94 A. D. 345; Bailey v. Moulthrop, 55 Vt. 17; Bowlin v. Nye, 10 Cush. 416; Abbott v. Kimball, 19 Vt. 551, 47 A. D. 708.

§ 302. **Intentional Destruction of Chattels.** — But whenever the destruction or loss of plaintiff's property is the result of an intentional act of defendant, a conversion will be held to have occurred, as where the servants of a common carrier adulterated a quantity of wine belonging to plaintiff, the carrier was held in trover as the property had been virtually destroyed by such act.¹

5. BY WRONGFUL DELIVERY

§ 303. **What Amounts to Conversion.** — In previous sections of this work,² it has been shown that if the one in possession of goods, whether as agent, carrier, pledgee or any other character of bailee, delivers them to one who holds them under a claim of ownership inconsistent with the rights of the true owner, or who seeks possession in order to devote the goods to a use inconsistent with such rights or of actually destroying them, then the one so wrongfully delivering the property has thereby committed a conversion of it for which he is liable in trover. Thus, a gratuitous bailee of a certificate of stock is liable for its conversion if he, without authority from its owner, delivers it to the officers of the corporation who cancel it and issue a new certificate to another person. In such case, the motive of the one so delivering is immaterial, since he is liable though the delivery was caused by a forged order.³ But a mere bailee, whether a common carrier or otherwise, is guilty of no conversion though he receive property from one not rightfully entitled to the possession, and, acting as a mere conduit, delivers it in pursuance of the bailment, if this is done before notice of the rights of the real owner. On the other hand, if he have such notice, his status is altogether altered, and he acts at his peril.⁴ Common carriers, by reason of the nature of their business, which imperatively requires them to receive and forward goods when tendered in the usual course of their business, have long formed an exception to the stringency of general rules in respect to what constitutes in similar cases a conversion. When goods come into the possession of a person by delivery or finding, he is not liable in trover for them without proof of a tortious act. And when a person receives goods by delivery from one whom he is entitled to regard as the owner, and having so received them

¹ *Deuch v. Walker*, 14 Mass. 500; *Burris v. Johnson*, 1 J. J. Marsh (Ky.) 196; *Hicks v. Lyle*, 46 Mich. 488, 9 N. W. 529; *Turnbull v. Widner*, 103 Mich. 509, 61 N. W. 784; *Scarborough v. Webb*, 59 Miss. 449.

² See Bailees; Pledgees; Carriers.

³ *Hubbell v. Blandy*, 87 Mich. 209, 49 N. W. 502, 24 A. S. R. 154.

⁴ *Cooley*, Torts, 456; *Dusky v. Rudder*, 80 Mo. 400.

conveys them to another to whom they are sent, he does no tortious act.¹

§ 304. **Re-delivery to One Found in Possession.** — What is such a mis-delivery of goods as will constitute a conversion having been fully discussed in the sections of this work above referred to, I will limit further discussion here to cases where goods have been delivered to one found in possession of them. The general rule is that where a bailee received goods from one whom he finds in possession of them, and whom he in good faith believes to be the owner of them or rightfully in possession, and subsequently re-delivers them to him pursuant to the terms of the bailment and without knowledge of the rights of the true owner, he is not liable to the latter for a conversion of the goods.² It will thus be seen that the question of good faith and notice of the rights of the owner control the determination of liability, although it has been suggested that a bailee may safely return the goods to one whom he found in possession of them, even after notice of the claim of the true owner, if no demand for possession has been made upon him by the latter, and he exercises or asserts no claim or title to the goods adverse to the title or inconsistent with the rights of the owner.³ But to me this holding does not appear to be consonant with the general principle underlying the law of conversion, that one shall do no act in relation to the property of another which has the effect of destroying it or impairing its use and enjoyment by the owner. And, while it is true that it puts an innocent person in a position of hardship, since he acts at his peril in either delivering or refusing to deliver the property either to the one in whose possession he found it or to the true owner claiming it, yet a greater degree of justice will be attained by requiring him while he has the property, to choose between the rights of the two and to be liable for a wrongful delivery, than if he were absolved from liability in all cases simply by restoring the property to him in whose possession he found it.⁴

§ 305. **Same Subject.** — But the courts of Massachusetts have gone a considerable length in exempting a person from liability in case of a mis-delivery of chattels, and there it has been held that a bailee of goods received from one who, he knew, did not have the right of possession is not liable for allowing them to be taken out of his possession by the bailor, where he did nothing to withhold possession from the owner, and nothing indicated that he would have with-

¹ *Nanson v. Jacob*, 93 Mo. 331, 3 A. S. R. 531; *Nelson v. Iverson*, 17 Ala. 216.

² *Burditt v. Hunt*, 25 Me. 419, 43 A. D. 289; *Metcalf v. McLaughlin*, 122 Mass. 48.

³ *Rembaugh v. Phipps*, 75 Mo. 422.

⁴ 6 *Wait's Actions & Defenses*, 180.

held possession had the owner demanded the goods.¹ And this rule has been extended to the protection of one who received goods from one in apparent possession of them, though in contemplation of law they were in the possession of the owner, the one so receiving them subsequently returning them to him who had been in the apparent possession of them. Thus, where a teamster, upon the request of a person to remove goods which were in the latter's house, removed the goods as requested and delivered them at a place designated by such person; the goods in fact belonged to a third person who had rented the room and placed them therein, leaving the door of the room neither locked nor fastened; in an action of trover against the teamster, the court absolved him from liability, announcing the rule that whoever receives goods from one in actual, although illegal, possession thereof, and restores the goods to such person, is not liable for a conversion by reason of having transferred them.² And it is said that "this would be so apparently, even if the goods thus received were restored to the wrongful possession after notice of the claim of the true owner. Upon the precise question raised we have found no direct authority, nor was any cited in the argument; but the principle on which the decision above cited rests is not unreasonably extended when it is applied to the circumstances of the case at bar. The act of removing goods by the direction of the wrongful possessor of them is an act in derogation of the title of the rightful owner; but the party doing this honestly is protected, because from such actual possession he is justified in believing the possessor to be the true owner. He does no more than such possessor might himself have done by virtue of his wrongful possession. . . . If a person standing near and in sight of a bale of goods lying on the sidewalk belonging to another, and thus in the legal possession of such other, is able at once to possess himself of it actually, although illegally, and directs a carrier to remove it and deliver it to him at another place, compliance with this order in good faith cannot be treated as a conversion; and apparent control, accompanied with the then present capacity of investing himself with actual physical possession, must be equivalent to illegal possession in protecting a carrier who obeys the order of one having such control."³ But it is thought the better rule holds the one so complying with such order

¹ *Loring v. Mulcahy*, 3 Allen (Mass.) 575.

² *Gurley v. Armstead*, 148 Mass. 267, 19 N. E. 389, 12 A. S. R. 555; *Strickland v. Barrett*, 20 Pick. 415; *Leonard v. Todd*, 3 Metc. (Mass.) 6.

³ *Id.*; see *Weyland v. A. T. & S. F. Ry. Co.*, 75 Ia. 573, 39 N. W. 899, 9 A. S. R. 504; *Wolfe v. Missouri Pac. Ry. Co.*, 97 Mo. 473, 10 A. S. R. 331; *Gibbons v. Farwell*, 63 Mich. 344, 29 N. W. 855, 6 A. S. R. 301.

guilty of a conversion if, at the time of removing and delivering the goods, he knows of the rights of the owner. Thus, it has been said that a gratuitous bailee (an inn-keeper in this instance) who delivers the subject of a bailment to a stranger, without effort to verify the latter's claim to the property, and without inquiry as to the ownership, is liable to the real owner for a conversion of the goods.¹ Then there is more reason for imposing liability when the one charged with a conversion *knew* that he was making a wrongful delivery.

6. BY AIDING OR ABETTING A WRONG-DOER

§ 306. **Third Party may be Equally Guilty with Wrong-doer.** — The rule has been announced that a party may be guilty of a conversion though he did not personally engage with the one who actually took possession of the property, and used, consumed and disposed of it, if he coöperated with him in those acts by aiding and abetting him in doing them, and by his subsequent recognition, approval and adoption of them; and the same rule is applied if a party who, though having no actual personal agency in the taking of the property, or in the subsequent use or disposition of it, yet advised and assisted another in the measure adopted for the taking of it, received benefits from the taking, and subsequently approved and adopted it.² Every person who aids or assists in the conversion of property, whether with knowledge of the facts or in ignorance thereof, is responsible to the owner for all the damages sustained thereby, although it was done by the direction of one whose command he was bound to obey, as a servant who takes property at the command of his master,³ or a soldier who takes property at the command of his superior officer.⁴ So, where a horse was hired to a person and delivered by the owner to a second person, but upon the credit of the first, and the horse was driven to death by the second, with the aid and assistance of the first who drove another horse near him on the same road, both were held guilty of a conversion.⁵ This under the rule that all who aid, command, advise or countenance the commission of a tort by another or approve of it after it is done,

¹ *Wear v. Gleason*, 52 Ark. 364, 12 S. W. 756, 20 A. S. R. 186; see *Bolling v. Kirby*, 90 Ala. 215, 7 So. 914, 24 A. S. R. 789.

² *Clark v. Whitaker*, 19 Conn. 319, 48 A. D. 160; *Stallings v. Gilbreath*, 146 Ala. 483, 41 So. 423; *Brooks v. Ashburn*, 9 Ga. 297.

³ *Gage v. Whittier*, 17 N. H. 312; *Kimball v. Billings*, 45 Me. 147.

⁴ *Yost v. Stout*, 4 Goldw. (Tenn.) 205.

⁵ *Barfield v. Whipple*, 10 Allen (Mass.) 27, 87 A. D. 618; see *Ballentine v. Joplin*, 105 Ky. 70, 20 Ky. L. R. 1062, 48 S. W. 417; *Hill v. Campbell Company*, 54 Neb. 59, 74 N. W. 388; *Maloon v. Read*, 73 N. H. 153, 59 Atl. 946; *Cone v. Iverson*, 4 Wyo. 203, 33 Pac. 31, 35 Pac. 933; *Perkins v. McCullough*, 36 Ore. 146, 59 Pac. 182.

if it is done for their benefit, are liable in the same manner that they would be if they had done it with their own hands.¹ And where a land-owner, knowing that a house had been wrongfully taken from the land of another, granted permission to the wrong-doer to place it upon his land, and then refused to permit the owner to remove it unless he first paid a sum which was claimed to be due him from the wrong-doer, he was held to have adopted the original conversion and was accordingly adjudged liable for the value of the house.²

§ 307. Merely Permitting Act of Another is no Conversion. —

But simply resisting with force the owner's attempt to get possession of his property has been held insufficient to constitute a conversion,³ since to support trover there must be a positive, tortious act.⁴ And unless a person can be held to have adopted a conversion made by another, either in receiving the benefit of it or by aiding, encouraging or abetting it when made, he cannot be held answerable for it on the ground that he merely suffered it to be done or did not resist it.⁵ Thus, merely receiving property from the wrongful possessor, and returning it before notice of his want of title, is no conversion.⁶ And a creditor is not liable in trover for legally procuring the appointment of a receiver and assisting him in conducting a sale under an order of court of property to which plaintiff claimed title under an execution sale against the original owner.⁷ And where a mortgagee in a wrongful sale consulted his wife as to what property he should deliver to the payee of a note against her which he had taken in part payment, it was held that she was not liable in trover.⁸ Nor is it a conversion to assist a mortgagee in moving chattels from one place to another, the mortgagee having been left in possession.⁹ And even in those states where the limitations on property rights of a wife exist, it is held that as there can be no conversion to the use of the wife during coverture, trover will not lie against her husband and herself for a conversion to her use only.¹⁰

¹ *Moir v. Hopkins*, 16 Ill. 313, 63 A. D. 312; *Doherty v. Madgett*, 58 Vt. 323, 2 Atl. 115.

² *Jonsson v. Lindstrom*, 114 Ind. 152; *Hardy v. Keeler*, 56 Ill. 152.

³ *Boobier v. Boobier*, 39 Me. 406.

⁴ *Polley v. Iron Works*, 2 Allen (Mass.) 182.

⁵ *Duffield v. Miller*, 92 Pa. St. 286; *Traylor v. Hughes*, 88 Ala. 617, 7 So. 159.

⁶ *Hill v. Hayes*, 38 Conn. 532.

⁷ *Walling v. Miller*, 108 N. Y. 173, 15 N. E. 65, 2 A. S. R. 400. In this case, however, it was held that the receiver's sale was regular and valid; if otherwise, the plaintiff doubtless would have recovered.

⁸ *Iler v. Baker*, 82 Mich. 226, 46 N. W. 377.

⁹ *Strickland v. Barrett*, 20 Pick. 415.

¹⁰ *Hollenback v. Miller*, 12 Fed. Cas. No. 6609, 3 Cranch C. C. 176.

7. BY WRONGFUL USE

§ 308. **Is Generally a Conversion.** — It is a general rule that one who, though lawfully in possession of another's chattels, makes an illegal use of them, or violates the condition upon which he holds possession, will be liable in trover for their conversion and will be held to pay the value of them.¹ Thus, where one of the joint owners of a promissory note, having it in his possession, surrendered it to the maker to be cancelled or destroyed, without the consent of his co-owner, such surrender was held a conversion.² And where the bailee of a chattel pledged it for his own debt, not only he, but his pledgee as well, was held guilty of a conversion.³ "No principle of law is better settled than if the bailee uses the property bailed for purposes variant from those for which, by the contract of bailment, they were to be used, that this constitutes a conversion and that trover is maintainable therefor. As, for instance, if one hires a horse to go to Hampden, and goes beyond that place or in an opposite direction, he would be liable in trover. So, if the stipulation be that the thing bailed is to be employed in the service of A and his business, the bailee would have no right to lease the property to another to be by him used. The bailor intrusts his property to the care and custody of the person with whom he contracts for its hire, but he confers upon him no general right of disposing of its use or enjoyment as he may see fit."⁴

§ 309. **Illustrations of Same Subject.** — A bailment for hire is ended by an absolute sale by the bailee of the property bailed before the expiration of the term, though such sale pass no title, and the owner may maintain trover therefor if the vendee refuses to deliver on demand; and the rule is the same though the bailee had the right to purchase the article during the term by paying the agreed price therefor.⁵ So, where a person had possession of a note or security belonging to another, and, under a claim of right or title in himself, received payment and surrendered the note, he was held guilty of a

¹ *Louisville Company v. Barkhouse*, 100 Ala. 543, 13 So. 534; *Atchison, etc. Co. v. Schriver*, 72 Kan. 550, 84 Pac. 119; *Thompson v. Carter*, 6 Ga. App. 604, 65 S. E. 599; *Great Western Co. v. News Assoc.*, 139 Mich. 55, 102 N. W. 286; *Hubbell v. Blandy*, 87 Mich. 209, 49 N. W. 502; *Bedford v. Flowers*, 11 Hump. (Tenn.) 242; see titles — Pledgee; Bailee; Collateral Security; *ante*.

² *Winner v. Pelliman*, 35 Md. 163, 6 A. R. 385.

³ *Thrall v. Lathrop*, 30 Vt. 307, 73 A. D. 306.

⁴ *Crocker v. Gullifer*, 44 Me. 491, 69 A. D. 118; see *Devoine v. Lumber Co.*, 64 Wis. 616, 25 N. W. 552; *Cuykendall v. Eaton*, 55 Barb. 188; *Perham v. Covey*, 117 Mass. 102; *Crump v. Mitchell*, 34 Miss. 449.

⁵ *Bailey v. Colby*, 34 N. H. 29, 66 A. D. 752 and note.

conversion.¹ And the same liability was held against one who received a transfer of and collected a promissory note with knowledge that it had been previously indorsed to another in blank as collateral.² And, in general, if a holder of collateral securities wrongfully surrenders them without the consent of his debtor, he makes himself liable for their conversion.³ So, where an agent had in his possession a watch belonging to his principal and delivered it to a third person in payment of his own debt, such was held a conversion.⁴ Likewise, where a bank had in its custody a special deposit for a customer but treated it as a part of the general fund of the bank, it was held liable in trover for a conversion.⁵

§ 310. **Rightful Use of Chattels is no Conversion.** — But, while any act of a defendant inconsistent with a continued recognition of plaintiff's title,⁶ or any abuse of a possession lawfully acquired, or any breach of the trust under which a chattel was placed in the defendant's hands,⁷ will amount to a conversion, yet any use the defendant has the right to make under his contract cannot constitute a conversion.⁸ And if a bailor either expressly or impliedly assents to a different use of the property by his bailee, or to its sale by him he cannot charge the bailee with its conversion.⁹ So, where money alleged to have been converted had been given by plaintiff to defendant for the purpose of paying himself a debt which plaintiff owed him and then to discharge other designated debts and to account to the plaintiff for the balance, and he so acted under the authority given, he was absolved from liability in trover.¹⁰ And where, on rescission of a sale of a slave the vendor refused to receive her back, the vendee was held not guilty of a conversion for allowing her to work,¹¹ nor where an inn-keeper used a horse belonging to a guest who had apparently abandoned the horse.¹² A lessor attempted to hold his lessee in trover for storing the former's goods after the expiration of the lease, but the court held that the action would not lie.¹³

¹ *Schroeppel v. Corring*, 5 Denio 236; *Donnell v. Thompson*, 13 Ala. 440.

² *Carter v. Lehman, etc.*, 90 Ala. 126, 7 So. 735; see *Allison v. King*, 25 Ia. 56.

³ *Griggs v. Day*, 136 N. Y. 152, 32 N. E. 612, 32 A. S. R. 704, 18 L. R. A. 120, 137 N. Y. 542, 32 N. E. 1001; see *Dunham v. Cox*, 81 Conn. 268, 70 Atl. 1033.

⁴ *Rodick v. Coburn*, 68 Me. 170.

⁵ *Monmouth Bank v. Dunbar*, 19 Ill. App. 558; see generally *Lowry v. Beckner*, 5 B. Mon. 41; *Badger v. Hatch*, 71 Me. 562; *Southwest Co. v. Cobble*, 124 Mo. App. 647, 102 S. W. 9.

⁶ *Joyce v. Sage Bros.*, 206 Mass. 9, 91 N. E. 996.

⁷ *Seago v. Pomeroy*, 46 Ga. 227; *White v. Phelps*, 12 N. H. 382; *Stephenson v. Feezer*, 55 Ind. 416; *Miller v. Thompson*, 60 Me. 322.

⁸ *Dokstader v. Y. M. C. A.*, — Ia. —, 109 N. W. 906.

⁹ *Kellog v. Fox*, 45 Vt. 348.

¹⁰ *Kerwin v. Balhatchett*, 147 Ill. App. 561.

¹¹ *Rand v. Oxford*, 34 Ala. 474.

¹² *Alvord v. Davenport*, 43 Vt. 30.

¹³ *Adams v. Weir*, 99 S. W. 726 (Tex. Civ. App.).

8. BY CLAIMING LIEN

§ 311. **Wrongful Claim of Lien a Conversion.** — A person in whose hands are chattels belonging to another who is entitled to possession of them will be liable for a conversion of the chattels if he claim a lien thereon where none exists by law, and refuses to surrender them till the amount of such asserted lien is paid, as if one who has taken care of a horse should refuse to deliver possession to the owner till paid for his services;¹ or if one not a warehouseman or engaged in the business of storage should refuse to give up goods that had been stored in his building till certain charges were paid, or the keeper of a livery stable should refuse to surrender a horse and carriage till paid for their keep;² or if an agister should insist on detaining cattle till charges for pasturage were paid.³ All of such cases, however, rest upon the proposition that no lien exists for such charges by law. But even where the lien exists, the party having the right to its benefits waives such right if he put his refusal to surrender possession upon some ground other than his right of lien; for it is said that in order to be made available in defense in an action of trover, the lienor must have set up his lien specifically as one of the grounds upon which he predicated his refusal to deliver on demand, otherwise he cannot rely upon it in defense.⁴ And where a person refuses to give up property on demand, upon which property he has a lien but for which lien he fails to make claim, he will be held in trover for a conversion; having set up no specific ground of refusal his failing to make a claim of lien will be treated as a waiver of it.⁵ So, if one in fact has a valid lien on personalty in his possession, but, without asserting the lien, surrenders possession to the owner, his lien is thereby lost, and if he subsequently regain possession of the property and refuse to give it up till the amount of the lien is paid, he will be held guilty of a conversion.⁶

§ 312. **No Conversion where Possession Rightful.** — But it may be said in general that if a person be rightfully in possession of chattels upon which he claims a lien for expenses incurred by him in good faith in the performance of some duty relating to such chattels, then he has the right to retain them till re-imbursed or paid for such ex-

¹ *Hoover v. Epler*, 52 Pa. St. 522.

² *Powers v. Hubbell*, 23 Cal. 364; *Wills v. Barrister*, 36 Vt. 220; *Bissell v. Pierce*, 28 N. Y. 252.

³ *Lewis v. Tyler*, 23 Cal. 364; *Wills v. Barrister*, *supra*; *Bissell v. Pierce*, *supra*.

⁴ *Picquet v. McKay*, 2 Blackf. (Ind.) 465.

⁵ *Hanna v. Phelps*, 7 Ind. 21; *Dows v. Moorewood*, 10 Barb. 183.

⁶ *Perkins v. Boardman*, 14 Gray 481; *King v. Canal Company*, 11 Cush. 231.

penses, and his detention of the chattels under such circumstances is not a conversion.¹ Of course, if the possession under which the expenses were incurred was wrongful *ab initio*, a valid lien could not, ordinarily, be obtained, and in such case the one claiming a lien for such expenses would be guilty of a conversion in refusing to surrender possession till the owner paid the charges claimed.²

9. BY WRONGFUL DETENTION

§ 313. **Is Generally a Conversion.** — The subject of wrongful detention of personal property is of such great importance in the law of trover that I have thought best to give to it a special chapter, and it will be later discussed under the heading of Demand and Refusal. It may be here said, however, that detention of the chattels of another, coupled with the exercise of dominion in some form in derogation of the owner's rights, will subject the one so detaining the property to an action of trover for its conversion; but where the plaintiff relies for his right of action upon the fact of detention by the defendant, proof of mere detention is not always regarded as sufficient; the evidence must go further and show a wrongful detention, that is, a detention under such circumstances as shows an intention on the part of the defendant to deprive the plaintiff of his right of property; the mere detention not of itself furnishing any evidence of such intention to convert the property to the defendant's own use, or to divest the property from the true owner.³ With this statement of the general rule, further discussion of the subject of detention as constituting a conversion will be reserved for the next chapter.

10. BY WORDS WITHOUT ACTS

§ 314. **When Overt Act Unnecessary.** — It being the rule that it is not necessary that a person, in order to be guilty of a conversion of chattels, should have had the actual manual possession thereof either in person or by agent, it is held that a conversion may consist of such written or spoken words as evince an intention on the part of him using them of claiming and exercising dominion over the

¹ *Martin v. Music Co.*, 79 Ark. 95, 94 S. W. 932; *Nutter v. Varney*, 64 N. H. 611, 5 Atl. 457; *Commercial Bank v. Pirie*, 82 Fed. 799, 27 C. C. A. 171.

² *Robinson v. Kaplan*, 21 Misc. 686, 47 N. Y. Supp. 1083.

³ 13 *Encyclopedia of Evidence*, 81, citing: *Estes v. Booth*, 20 Ark. 583; *Donlin v. McQuade*, 61 Mich. 275, 28 N. W. 114; *Allgear v. Walsh*, 24 Mo. App. 134; *Randolph Iron Co. v. Elliott*, 34 N. J. L. 184; *Montague v. Montgomery*, 19 N. Y. Supp. 655, 47 N. Y. St. 114; *Young v. Lewis*, 9 Tex. 73; *Strauss v. Schwab*, 104 Ala. 669, 16 So. 692; *Thompson v. Rose*, 16 Conn. 71.

chattels in a manner inconsistent with the rights of the owner although there is no moving or seizing the chattels, and no interference with them except in the use of such words. Thus, in an action of trover for the conversion of certain shingles, it appeared that plaintiff wrote to the defendant demanding the shingles. The defendant replied denying that he had ever had any shingles belonging to the plaintiff. The court held such circumstances to be a conversion, it appearing that the shingles were actually in the possession of the defendant at the time.¹ So, where one claiming to be the owner of certain hay notified the owner not to remove it, and indicated his intention and design that the one in whose possession it then was should use it and the latter did in fact use it, the court held the one so claiming it as well as the one using it guilty of a conversion. It appeared in the case that the defendant had sold plaintiff's hay to one Bosworth, and in its decision the court remarked: "His (defendant's) claiming that he bought it of plaintiff, and his forbidding plaintiff to remove it, then in the actual possession of Bosworth, was evidence from which it was competent to find that his purpose was to enable his vendee to consume the hay, and that, for the purpose of this case, its conversion by the vendee. In authorizing and aiding Bosworth to convert it to his own use, he became liable to the plaintiff in trover."²

§ 315. **Illustration of Same Subject.**—The principle above spoken of was applied in a case where the defendant had sold a mare belonging to the plaintiff, the mare not being in the possession of the defendant who delivered to his vendee an instrument of sale therefor. In holding the defendant liable in trover, the court said: "It is not every interference with the property of another which constitutes a conversion. One person may remove the property of another from one place to another place without being guilty of a conversion of it to his own use. He may do it without asserting any claim to it for the benefit of the owner and admitting his title to it. But if one person interferes with the goods of another without his consent, and undertakes to dispose of them as having the property, he does so at his peril; and there need be no manual taking or removal in order to constitute a conversion. It is sufficient if he exercises an authority over the goods against the will and to the exclusion of the owner by an unlawful intermeddling with them, or assumes upon himself the property and right of disposing of them."³ But it is said

¹ *Pattee v. Gilmore, et al.*, 18 N. H. 460, 45 A. D. 385.

² *Baker v. Beers*, 64 N. H. 102, 6 Atl. 35, citing *Flanders v. Colby*, 28 N. H. 34.

³ *Webber v. Davis*, 44 Me. 147, 69 A. D. 87; see *Bristol v. Burt*, 7 Johns. 254, 5 A. D. 264.

that the assertion of title to or interest in property of another when the person setting up the claim has not the possession or control of it, is not an act of conversion,¹ although, if he have it in his possession either actually or constructively, and claims a right to it or its possession, and retains control over it, he will be guilty of a conversion.² Thus, where one having property of another in his possession, threatened the owner with physical violence, or to sue him, if he took the property away, such was held a conversion.³

§ 316. **Owner's Rights not Interfered With.** — But an interference, even though attended with serious consequences to the owner of property, will not amount to a conversion if it leave the owner's rights undisturbed.⁴ And in another case, one who had purchased property from a person having no title was visited at his home thirty miles distant from the property involved, by its real owner, who there made a demand for its possession, to which such purchaser replied that he was willing to do what was right; that he did not want any trouble about it; that he would not give it up unless he was released from paying the man he bought it of. There was at the time nothing to prevent the owner from taking possession of the property. In exonerating the purchaser from liability for a conversion, the court said: "It is true that, to constitute a conversion, a manual taking is not necessary but where the words are relied upon, they must be uttered in such circumstances in proximity to the property as to show defiance of the owner's rights — a determination to exercise dominion and control over the property, and to exclude the owner from the exercise of his rights."⁵ So, where an action was brought for the conversion of logs, the evidence relied on was that after a conveyance from plaintiff to the defendants of the land upon which the logs were located, a stranger applied to the defendants for permission to purchase the logs from plaintiff, which the defendants refused, claiming to have bought the logs themselves. There was no other interference with the logs by the defendants. The courts in passing upon the case, said: "We have no doubt that the mere assertion by the defendants that the property belonged to them, is not in any sense evidence of a conversion, or from which a conversion can be inferred. If this assertion had been made in the presence of plaintiff and at a time when he claimed to take possession of the logs and for the purpose of deterring him therefrom, it might

¹ *Lowry v. Walker*, 4 Vt. 81.

² *Fireman's Co. v. Cochran*, 27 Ala. 228; *Taylor v. Harrall*, 4 Blackf. (Ind.) 317.

³ *Crocket v. Beaty*, 8 Humph. (Tenn.) 20; *Hare v. Pearson*, 4 Ired. 76.

⁴ *Nelson v. Whetmore*, 1 Rich. 318.

⁵ *Gillet v. Roberts*, 57 N. Y. 28.

merit a different consideration. But made as it was to a stranger, and not in the presence of plaintiff, or within view of the logs, it would be too much to say this is evidence from which the jury could be permitted to infer a conversion of the property by defendants.”¹

11. BY NEGLIGENCE

§ 317. **Negligence Not a Conversion.** — If personal property is in the possession of one other than its owner, and is lost, stolen or damaged by reason of the lack of ordinary care on the part of the custodian, or is injured by accident, or through his mere negligence or non-feasance, not accompanied by any appropriation to his own use, such custodian will not be liable for a conversion; for a conversion is an appropriation of property, either actual or constructive, and any wrong which does not amount to such appropriation is not a conversion, and while the injured party has some remedy, the facts will not support an action of trover. Trover will lie only where the defendant is guilty of a conversion, which implies a wrongful disposition, appropriation, wasting, destruction or withholding of the property. The essential element of a conversion is malfeasance. The action will lie against a common carrier for a mis-delivery of goods, or an appropriation of property to its own use, or for any act of dominion or ownership antagonistic to and inconsistent with the plaintiff's claim or right. But trover will not lie against a carrier for goods lost by accident, or stolen, or for non-delivery, unless there be a refusal to deliver while having possession; nor for any act or omission which amounts to negligence merely and not to an actual wrong. So, also, a bailee is not liable for a conversion who deals negligently with goods intrusted to him. And, on like principles, trover will not lie against a mail contractor for money lost by negligence, or stolen, unless the theft was authorized by him.²

§ 318. **Illustrations of Same Subject.** — In a case where it was sought to recover from a carrier the value of goods intrusted to him at New York for delivery at Memphis, and not delivered, the evidence showed that the box originally containing the goods was found empty in the water in New York harbor a year afterward. In passing on these facts, the court used this language: “There was no evidence of a conversion of the goods by the defendants. This court

¹ *Irish v. Cloyes*, 8 Vt. 30, 30 A. D. 446.

² *Cent. Ry. & B. Co. v. Lamphrey*, 76 Ala. 357, 52 A. R. 334; *Packard v. Getman*, 4 Wend. 613, 21 A. D. 166; *Conner v. Allen*, 33 Ala. 515; *Forehand v. Jones*, 84 Ga. 508, 10 S. E. 1090; *Cohen v. Koster*, 133 N. Y. App. Div. 570, 118 N. Y. Supp. 142; *Moses v. Norris*, 4 N. H. 304.

held that the non-delivery of the goods, with the other proof in the case, was evidence of negligence to be submitted to the jury, and that the *onus* was upon the defendants to show that they were lost without the negligence of the carrier or their servants. But an action for a conversion could not be sustained upon such evidence alone. A conversion implies a wrongful act, a wrongful disposition or withholding of the property. A mere non-delivery will not constitute a conversion, nor will a refusal to deliver on demand, if the goods have been lost through negligence or have been stolen. It would have been error to charge the jury that they might find a conversion upon the evidence before them, which was merely that the goods had not been delivered to the consignee, and that the box in which they had been delivered to the carrier had been found in the water in or near New York harbor, a year or thereabouts thereafter. The last circumstance did not add to the proof of non-delivery as tending to show in what way the loss had occurred, whether the box had been stolen, or had been casually, and by ordinary neglect, lost and rifled of its contents, and thrown away. But it is urged that the defendants were guilty of mis-feasance, or of an abandonment of their character as carriers, and therefore liable. The difficulty, however, is that negligence only was proved, and that is not the mis-feasance or abandonment of the character of carrier, which deprives the carrier of the limitations of the contract. The case quoted, and all the cases recognize the distinction between mere negligence in the performance of duty from which loss ensues, and acts of mis-feasance, a wrongful dealing with the property not consistent with or in the course of the performance of duty as a carrier.”¹

§ 319. **Same Subject.** — So, in a case where an attaching officer sued a receiptor of the attached property in trover for damage to the property resulting from the negligence of the latter, the court held that the action could not be maintained, and said: “The instructions to the jury in the particulars excepted to, proceeded upon the ground that if the wagon, by the defendant’s negligence in taking care of it, became materially damaged and lessened in value, this negligence, although a mere non-feasance, should be treated as equivalent to a conversion of the wagon by them. When the attached property was demanded of the defendants, there was no refusal by them to return it to the plaintiff, but on the contrary they offered to deliver to the plaintiff all that was left of the wagon after it had

¹ *Maguin v. Dinsmore*, 70 N. Y. 410, 26 A. R. 608, citing *Angell on Carriers*, 431-433; see *Berman v. Kling*, 81 Conn. 403, 71 Atl. 507; *Buck v. Ashley*, 37 Vt. 475; *Bowlin v. Nye*, 10 Cush. 416; *Bailey v. Moulthrop*, 55 Vt. 17.

been broken in pieces by the fall of the barn, and the plaintiff refused to receive the remains of the wagon which were so offered to him. The mere negligence of the defendants in respect to the keeping of the wagon with proper care was no repudiation of the plaintiff's right to it, nor was it any assertion or exercise of any dominion over it inconsistent with the plaintiff's right. If the plaintiff was injured, or sustained damages by reason of the defendants' negligence in the care of the wagon, he could on a proper count in case recover the full measure of his damages; but under the instructions given to the jury, they were not at liberty, if they found the alleged negligence of the defendants proved, to return a verdict in favor of the plaintiff for a less sum than the whole value of the wagon as estimated in the receipt, even though the actual damage to it occasioned by such negligence might not have been more than one half or even one quarter of that value. We regard the instructions to the jury erroneous so far as they required the jury to treat the negligence or mere non-feasance of the defendants in respect to the care of the wagon as equivalent to a conversion, if the wagon was thereby materially damaged or lessened in value; and on this ground there must be a new trial."¹

§ 320. **Negligence after Conversion no Defense.** — But if, after a conversion has once occurred, the property is either lost or destroyed through the negligence of the custodian, or the wanton or lawless acts of other persons, the cause of action which arose as soon as the conversion took place will not be lost by such subsequent acts of negligence, and the subsequent loss or destruction will constitute no defense to the action for the conversion.² So, the negligence of the owner of goods which contributes to a conversion of them will not interfere with his action of trover against a *bona fide* purchaser of the goods unless the negligence was so gross as to raise a presumption of the owner's assent to the wrongful act.³

12. BY MISCELLANEOUS ACTS

§ 321. **What Sufficient to Show Conversion.** — There are other acts of conversion which do not properly come under any of the heads above enumerated and some of these will be here briefly noted. Thus, it has been held a conversion for a master of a ship to refuse to

¹ *Tinker v. Morrill*, 39 Vt. 477, 94 A. D. 345; *Dorman v. Kane*, 5 Allen (Mass.); 38; *Abbott v. Kimball*, 19 Vt. 558, 47 A. D. 708; *Nutt v. Wheeler*, 30 Vt. 436, 73 A. D. 316; *Hawkins v. Hoffman*, 6 Hill 586, 41 A. D. 767; *Dearbourne v. Bank*, 58 Me. 273; *Spokane Company v. Express Company*, 55 Wash. 545, 104 Pac. 794.

² *Mason v. O'Brien*, 42 Miss. 420.

³ *Pease v. Smith*, 61 N. Y. 477.

proceed on a voyage or deliver the cargo to its owners,¹ as has the removal of goods by a purchaser after notice that his vendor held them as factor;² a delivery of property by mistake to a person other than the owner, resulting in its loss;³ cutting and carrying away electric wires;⁴ wrongfully transferring a warehouse receipt;⁵ taking money forcibly from debtor;⁶ taking property under a license previously revoked;⁷ and wrongfully interfering with the personal property belonging to the estate of a decedent.⁸

§ 322. **Breach of Contract no Conversion.** — But a breach of contract, even though it result in the loss to the owner of specific property, will not support an action of trover,⁹ unless defendant's failure to perform his part of the contract resulted in preventing plaintiff from regaining possession of his property, in which event it is said a conversion has occurred for which trover may be maintained.¹⁰ But as a general proposition it may be said that a conversion does not take place where the relation of the parties is that of debtor and creditor;¹¹ nor where the act is that of public officers,¹² although it is held that an officer who confiscates private property for a public or other use is guilty of a conversion.¹³ It is held not to be a conversion to remove from one's premises to another's, goods left there by the owner, if no further dominion is claimed over them or exercised in regard to them.¹⁴

¹ *Portland Bank v. Stubbs*, 6 Mass. 422.

² *Scribner v. Master*, 11 Cal. 303.

³ *Cerkel v. Waterman*, 63 Cal. 34; *Louisville Company v. Barkhouse*, 100 Ala. 543, 13 So. 534.

⁴ *Elec. Co. v. Met. Tel. Co.*, 75 Hun 68, 27 N. Y. Supp. 93, affirmed in 148 N. Y. 746, 43 N. E. 986.

⁵ *Hamlin v. Carruthers*, 19 Mo. App. 567.

⁶ *Murphy v. Virgin*, 47 Neb. 692, 66 N. W. 652.

⁷ *Holland v. Osgood*, 8 Vt. 276.

⁸ *Goldstein v. Susholtz*, 46 Tex. Civ. App. 582, 105 S. W. 219.

⁹ *Merchants Bank v. Frost*, 62 N. J. L. 476, 41 Atl. 685; *Davis v. Thompson*, 10 Pa. Cas. 563, 14 Atl. 169; *Newlin v. Prevo*, 90 Ill. App. 515; *Camp v. Casey*, 110 Ga. 262, 34 S. E. 277.

¹⁰ *Ford v. Roberts*, 14 Col. 291, 23 Pac. 322; *Southern Railway Co. v. Attalia*, 147 Ala. 653, 41 So. 664.

¹¹ *John v. Lindsay*, 132 Ala. 567, 31 So. 484; *Borland v. Stokes*, 120 Pa. St. 278, 14 Atl. 61; *Hurst v. Mellinger*, 73 Tex. 188, 11 S. W. 184.

¹² *Traylor v. Hughes*, 88 Ala. 617, 7 So. 159.

¹³ *Davidson v. Manlove*, 2 Cald. (Tenn.) 346; *Moran v. Snell*, 5 W. Va. 26.

¹⁴ *Browder v. Phinney*, 37 Wash. 70, 79 Pac. 598; *Shea v. Milford*, 145 Mass. 525, 14 N. E. 769; *Steele v. Marsicano*, 102 Cal. 660, 36 Pac. 920.

CHAPTER VI

DEMAND AND REFUSAL

1. WHEN DEMAND REQUIRED

- § 323. Where possession originally rightful.
- § 324. Illustrations of same subject.
- § 325. Same subject.

2. WHEN DEMAND UNNECESSARY

- § 326. Where property wrongfully taken.
- § 327. Demand where conversion otherwise shown.
- § 328. Where chattels wrongfully seized.
- § 329. Possession obtained by mistake or fraud.
- § 330. Same subject; demand unnecessary.
- § 331. Illustrations of same subject.
- § 332. Where conversion previously occurred.
- § 333. Possession obtained under contract.
- § 334. Illustrations of previous conversions.
- § 335. Possession obtained by one entitled to it.
- § 336. Demand useless.
- § 337. Same subject.
- § 338. Same subject.
- § 339. Demand excused by act of defendant.
- § 340. Chattels received under contract of sale.

3. DEMAND ON PARTICULAR PERSONS

- § 341. Officers.
- § 342. Attached chattels mixed with those of stranger.

- § 343. Wrongful purchaser.
- § 344. Same subject.
- § 345. Whether wrongful purchase is a conversion.
- § 346. Same subject; is generally a conversion itself.
- § 347. Demand on *bona fide* purchaser.
- § 348. Same subject.
- § 349. Same subject; good faith immaterial.
- § 350. Same subject.
- § 351. Some states hold demand necessary against innocent purchaser.
- § 352. Same subject.
- § 353. Doctrine of these courts repudiated.
- § 354. Bailees.
- § 355. Illustrations of same subject.
- § 356. Same subject.
- § 357. Partners.
- § 358. Co-tenants.
- § 359. Same subject; where actions between co-owners.
- § 360. Agents.
- § 361. Same subject; money received for principal.

4. REQUIREMENTS OF DEMAND

- § 362. General principles.
- § 363. Demand must be definite.
- § 364. Is sufficient if intention understood.
- § 365. By whom demand made.
- § 366. Demand by agent.
- § 367. Demand by other persons.
- § 368. Upon whom demand made.
- § 369. Demand upon partner.
- § 370. How demand made.

§ 371. Demand by letter.	§ 377. When refusal insufficient as a conversion.
§ 372. Time and place of demand.	§ 378. Same subject; refusal qualified.
§ 373. Same subject.	§ 379. Illustrations of same subject.
5. EFFECT OF DEMAND AND REFUSAL	§ 380. In case of lost property.
§ 374. When evidence of a conversion.	§ 381. Refusal by one unable to comply with demand.
§ 375. Where refusal unqualified.	§ 382. Who chargeable by refusal.
§ 376. Refusal is denial of owner's rights.	

1. WHEN DEMAND REQUIRED

§ 323. **Where Possession Originally Rightful.** — It has been stated in another section in this work,¹ that proof of mere detention of property by one other than its owner is not always regarded as sufficient to show a conversion, but there must be a further showing of a wrongful detention. Therefore, in those cases where the property originally came lawfully into the possession of the defendant, and he has since done nothing with it inconsistent with the rights of the owner or contrary to the terms upon which it came into his hands, the owner cannot sustain an action against him for a conversion without first showing that he has made a proper and timely demand which the defendant refused to honor.² On principle, this rule can apply only when no other act amounting to an actual conversion has been done prior to such demand and refusal, and under such circumstances that, without a demand therefor by the owner, the person on whom it was made would still be entitled to continue in possession of the property. The rule has received frequent application in cases of bailment where the possession was acquired rightfully. And a strong exemplification of the doctrine appears in a case where possession was originally obtained by the defendant under a contract of sale which subsequently was learned to be void, because made with a married woman in a state where it was necessary to procure the consent of her husband and such consent had not been procured. In holding that the action of trover could not be maintained in that case without a demand and refusal of possession, the court set out the following explanation: "In *Glaze v. McMillan*, 7 Port. 279, Goldthwaite, J., said: 'It is believed that all conversions may be divided into four distinct classes: 1. By a wrongful

¹ § 310.

² *Scrivener v. Woodward*, 139 Cal. 314, 73 Pac. 863; *Ramirez v. Main*, — Ari. —, 89 Pac. 508; *Auld v. Butcher*, 22 Kan. 400; *Town v. Hazen*, 51 N. H. 596; *Buffington v. Clark*, 15 R. I. 437, 8 Atl. 247; *Ogden v. Lucas*, 48 Ill. 492; *Lamb v. Utley*, 146 Mich. 654, 110 N. W. 50; *Whitney v. Slanson*, 30 Barb. 276.

taking, 2. By an illegal assumption of ownership, 3. By an illegal user or mis-user, and 4. By a wrongful detention. In the three first-named classes, there is no necessity for a demand and refusal, as evidence arising from the acts of the defendant is sufficient to prove the conversion. In the latter class alone is such evidence (on demand and refusal) to be required, as the mere detention of a chattel furnishes no evidence of a disposition to convert it to the holder's own use, or divest the true owner of his property.' Property taken and held under a void contract of sale cannot be said to be wrongfully taken, since it passed to the purchaser and is held by him through the voluntary act of the seller and according to the intention of both parties. Nor can it be said in such case that there is an illegal assumption of ownership by the purchaser, that could only result where the assumption of ownership is against the consent and intention of the seller. And there could be no illegal user or mis-user while it is held under such void sale, since, though the sale be void, so long as it is not disaffirmed by the seller, he is in the attitude of consenting to all uses to which an absolute owner might devote the chattels. And so it is with the possession. That, as well as the taking, the assumption of ownership and the uses to which the property is put, whatever they may be, is, notwithstanding the contract of sale is void, by the permission of the seller, and cannot be tortious until that permission is withdrawn by an election properly evinced on his part to set aside the sale and reclaim the property.¹ The purchaser being then in possession by permission of the seller and according to his intention, and under no obligation to return the property until the seller elects to set aside the void sale and to reclaim the chattels as if no sale had been made, he cannot come within the fourth class of conversions as stated in *Glaze v. McMillan, supra*: he cannot be guilty of a wrongful detention until he has notice of such election and reclamation by a demand on him for the property, and a refusal on his part to comply with the demand, and the action of trover cannot be maintained, of course, without such demand and refusal."²

§ 324. **Illustrations of Same Subject.**—So, where an owner delivered personal property to his agent to sell for cash, and in violation of his instructions the agent sold on credit and delivered posses-

¹ Citing *Bolling v. Kirby*, 90 Ala. 215, 7 So. 914, 24 A. S. R. 789 and notes; *Voltz v. Blackmar*, 64 N. Y. 646.

² *Strauss v. Schwab*, 104 Ala. 669, 16 So. 692; *Moynahan v. Prentiss*, 10 Col. App. 295, 51 Pac. 94; *Louisville Company v. Kauffman*, 141 Ala. 671, 37 So. 659; *Fairbank v. Phelps*, 22 Pick. 535; *Jebeles Company v. Hutchinson*, 171 Ala. 106, 54 So. 618.

sion, and in holding this no conversion, and a demand necessary, the court said: "There was authority to sell, and that being so the sale on a credit was a mere violation of instructions as to terms of sale. Such a sale would pass title unless the purchaser knew of violations of instructions, and a sale which passes title is no conversion, though it may be an abuse of authority. It is like selling at a less price than that named in the agent's instructions. A sale on credit by an agent in possession of the goods and authorized to sell for cash only, is not a conversion — certainly not unless it appear that the purchaser had notice of the limitation in the agent's instructions. . . . Ruling as we do, that the credit sale was not a conversion, either of the whole stock or the part sold, and no demand appearing as having been made prior to the commencement of the action, we see no evidence in the record of any conversion at all on which to base a recovery. Unless an actual conversion by a bailee be shown, an action of trover against him will not lie without a previous demand for the goods and failure to deliver."¹

§ 325. **Same Subject.** — And a seizure of goods by an officer not being tortious where he takes them under regular process in favor of a creditor of a fraudulent vendee, therefore, the vendor, to enable him to maintain trover therefor against the officer, must make a demand upon him.² And where a pledgee agreed to cancel the principal debt and return the pledged property in consideration of certain work to be done by the debtor, proof of demand and refusal to deliver the property pledged was held essential to show a conversion.³ And the rule has been applied in the case of an intermingling of goods even though there has been a previous conversion,⁴ where goods have been sold upon credit through the fraud of the purchaser,⁵ and where the defendant was a gratuitous bailee.⁶ A purchaser of mortgaged personalty acquires the right of possession that his vendor had, and he cannot be held for a conversion of it till a demand is made upon him by the mortgagee.⁷ So, where a contract of sale was avoided,

¹ *Loveless v. Fowler*, 79 Ga. 134, 4 S. E. 103, 11 A. S. R. 406; see *Moore v. Refrigerator Co.*, 128 Ala. 621, 29 So. 447; *Southwest Co. v. Cobble*, 124 Mo. App. 647, 102 S. W. 9; *Andrews v. Carl*, 77 Vt. 172, 59 Atl. 167; *Jones v. Gregg*, 17 Ind. 84; *Freehill v. Hueni*, 103 Ill. App. 118; *McLain v. Huffman*, 30 Ark. 428; *Stevens v. Stevens*, 132 Mo. App. 624, 112 S. W. 35; *Finch v. Clark*, 61 N. C. 335; *Towne v. Elevator Company*, 8 N. D. 200, 77 N. W. 608.

² *Thompson v. Rose*, 16 Conn. 71, 41 A. D. 121; see *Weston v. Carr*, 71 Me. 356; *Hicks v. Cleaveland*, 39 Barb. 573.

³ *Scrivener v. Woodward*, 139 Cal. 314, 73 Pac. 863.

⁴ *Bond v. Ward*, 7 Mass. 123.

⁵ *Lacker v. Rhodes*, 45 Barb. 499.

⁶ *Polk v. Allen*, 19 Mo. 467; *Kennet v. Robinson*, 2 J. J. Marsh. 84.

⁷ *Cutlett v. Stokes*, 21 S. D. 108, 110 N. W. 84; *First National Bank v. Elevator Company*, 11 N. D. 280, 91 N. W. 436.

but prior thereto the goods had passed to the vendee's assignee in insolvency, demand was held a prerequisite to the action of trover.¹ And where chattels were on land at the time defendant recovered such land in ejectment, he thus came rightfully into possession of them and a demand was necessary before he could be held liable in trover for their conversion.² An examination of these cases will sufficiently illustrate the rule that a demand is necessary in all cases where possession by the defendant was originally rightful and there has been no subsequent act upon his part amounting to an actual conversion.³ Of course, where there is a statutory provision relating to this principle, that must be complied with; as where the statute provided that "a depositary is not bound to deliver a thing deposited, without demand, even where the deposit is made for a specified time," it was held that a demand was necessary before suit, and that the complaint should show such demand.⁴

2. WHEN DEMAND UNNECESSARY

§ 326. **Where Property Wrongfully Taken.** — While it is the rule that a demand and refusal of possession of property are necessary in all cases where the defendant became in the first instance lawfully possessed of the goods and the plaintiff is not prepared to prove some distinct act of conversion,⁵ yet the converse of this is true, that if the taking of the property is tortious, no demand is necessary or prerequisite to an action of trover.⁶ This principle has been well explained thus: "Whoever takes the property of another, without his assent, express or implied, or without the assent of some one authorized to act in his behalf, takes it, in the eye of the law, tortiously. His possession is not lawful against the true owner. That is unlawful which is not justified or warranted by law; and of this character may be some acts which are not attended with any moral

¹ *Goodwin v. Wertheimer*, 99 N. Y. 149.

² *Witherspoon v. Blewett*, 47 Miss. 570.

³ For further illustration of the doctrine, see: *Yeager v. Wallace*, 57 Pa. St. 365; *Taylor v. Hawlon*, 103 Pa. St. 504; *Bourch v. Platt*, 114 N. Y. Supp. 26; *Besson v. Levy*, 110 N. Y. Supp. 230; *MacDonnell v. Loan Co.*, 193 N. Y. 92, 85 N. E. 801; *Semon v. Adams*, 79 Conn. 81, 63 Atl. 661; *Gaw v. Bingham*, 107 S. W. 931 (Tex.); *Andrews v. Carl*, 77 Vt. 172, 59 Atl. 167; *Temple Company v. Insurance Company*, 69 N. J. L. 36, 54 Atl. 295; *Hicks v. Moyer*, 10 Ga. App. 488, 73 S. E. 754; *Austin v. Van Loon*, 36 Col. 196, 85 Pac. 183; *Metcalfe v. Dickman*, 43 Ill. App. 284; *Liptrot v. Holmes*, 1 Ga. 381.

⁴ *Cassidy v. Slemons*, 41 Mont. 426, 109 Pac. 976.

⁵ *Chitty, Pleading*, p. 170; *Friswig v. Orr*, 49 Cal. 617.

⁶ *Gates v. Gates*, 15 Mass. 311; *Hunt v. Boston*, 183 Mass. 303, 67 N. E. 244; *Crane Company v. Bellows*, 116 Mich. 304, 74 N. W. 481; *Reynolds v. Fitzpatrick*, 23 Mont. 52, 57 Pac. 452; *Porell v. Cavanaugh*, 69 N. H. 364, 41 Atl. 860; *Rhoades v. Drummond*, 3 Col. 374; *Braswell v. McDaniel*, 74 Ga. 319.

turpitude. A party honestly and fairly, and for a valuable consideration, buys goods from one who had stolen them. He acquires no rights under his purchase. The guilty party had no rightful possession against the true owner, and he could convey none to another. The purchaser is not liable to be charged criminally, because innocent of any intentional wrong, but the owner may avail himself against him of all civil remedies provided by law for the protection of property. If the bailee of property for a special purpose, sells it without right, the purchaser does not thereby acquire a lawful title or possession. In the case before us, Staples was rightfully in possession of the horse, but had no right to sell him; if he had, the plaintiff would, upon the sale, have ceased to be the owner, which has been negatived by the verdict. It does not follow because his possession was rightful that those who hold under him are also lawfully in possession. Indeed, the very reverse is true. Staples had the horse by the assent of the owner, but he sold him in his own wrong, and in violation of the rights of the plaintiff. The defendant came honestly by the horse, but he did not receive possession of him from one authorized to give it and is therefore liable *civiliter* to the true owner, for the taking as well as for the detention.”¹ The court, therefore, concluded that a demand was unnecessary.

§ 327. **Demand Where Conversion Otherwise Shown.** — That a demand is unnecessary in cases where original tortious taking is shown results from the rule to be hereinafter discussed that a demand is never necessary where any previous act of conversion can be shown, and it is evident that such wrongful taking is a conversion. “In 2 Esp. N. P. 580, the law is laid down thus: ‘When the taking of the goods has been tortious, an actual conversion to the party’s own use is not necessary to maintain this action.’ It would have been more correct to say, that where there has been a tortious taking, there has been a conversion.”² Thus, the taking possession of chattels and claiming them under a sale by one who had no power to sell, is a conversion and renders the buyer liable in trover to the owner without a prior demand.³ But in such case there are really two distinct acts of conversion — the wrongful taking, and exercising dominion by claiming title. As an instance of what is a wrongful

¹ Galvin v. Bacon, 11 Me. 28, 25 A. D. 258, a case of replevin but announcing the same principles as apply in trover; see Morely v. Roach, 116 Ill. App. 534; Dunnahoe v. Williams, 24 Ark. 264; Haas v. Taylor, 80 Ala. 459, 2 So. 633; Kronschnable v. Knoblauch, 21 Minn. 56; Merchants Bank v. Trenholm, 12 Heisk. 520; Warren v. Smith, 35 Utah 455, 100 Pac. 1069.

² Woodbury v. Long, 8 Pick. 543, 19 A. D. 345.

³ Hyde v. Noble, 13 N. H. 494, 38 A. D. 508.

taking of property within the meaning of this rule, it appeared in one case that one of the co-owners of a mill wrenched and carried away certain parts of the machinery while the other owner was present and protesting against such act. In an action against the wrong-doer for a conversion, the court said: "It was not necessary that the plaintiff should make a formal demand for possession of the property before bringing action, if, as both plaintiff and defendant testified, he was present, forbidding, when it was removed from the land. The law did not require him to act on the assumption that one who took it away in the face of his protest would return it at his request, or to accept it in full satisfaction of his damages if there was a voluntary offer to return it."¹ So, in a case where an insurance company had fraudulently induced an infant's guardian to surrender a policy upon certain false claims that the policy was void, the infant sued the insurance company in trover without first making a demand for the policy. In holding such demand unnecessary, the court said: "It is further insisted by defendant in error that no demand was made for the return of this policy. To this it must be answered that proof of demand and refusal is necessary where the defendant became, in the first instance, lawfully possessed of the chattels, and the plaintiff is not prepared to prove some distinct act of conversion. But demand and refusal are unnecessary, if the taking is tortious, or if an actual conversion is shown."²

§ 328. **Where Chattels Wrongfully Seized.** — The tax collector of a town seized goods of plaintiff under a warrant from the assessors of the town, and sold them for the payment of plaintiff's taxes; but the seizure was made after the expiration of the time prescribed by the statute therefor. The court, in an action of trover against the collector for the value of the goods, held that the seizure was wrongful and therefore constituted a conversion, and that a demand and refusal of possession were unnecessary.³ And demand is unnecessary where possession was obtained by duress or threats.⁴ And it was held unnecessary in a case where a servant, in leaving his master's

¹ *Waller v. Bowling*, 108 N. C. 289, 12 S. E. 990, 12 L. R. A. 261; see *McConnell v. Stamp*, 147 Ill. App. 56; *Springer v. Groom*, 9 Pa. 123, 12 Atl. 446; *Loomis v. Lincoln*, 24 Vt. 153; *Adams v. Loomis*, 54 Hun 638, 8 N. Y. Supp. 17; *Ray v. Davison*, 24 Mo. 280.

² *Hayes v. Mass. Etc. Insurance Co.*, 125 Ill. 626, 1 L. R. A. 303, citing: *Chitty*, Pleading, 157, note 2; *Ryan v. Brant*, 42 Ill. 78; *Bruner v. Dyball*, 42 Ill. 34; *Gibbs v. Jones*, 46 Ill. 319; *Bane v. Detrick*, 52 Ill. 19; *Hardy v. Keeler*, 56 Ill. 152. See *University of N. C. v. Bank*, 96 N. C. 280, 3 S. E. 359.

³ *Pierce v. Benjamin*, 14 Pick. 356, 25 A. D. 396; see *Farrington v. Payne*, 15 Johns. 431; *Prescott v. Wright*, 6 Mass. 20; *Gentry v. Madden*, 3 Ark. 127; *Matheney v. Johnson*, 9 Mo. 232.

⁴ *Foshay v. Ferguson*, 5 Hill 154.

employ, took away certain goods belonging to the latter.¹ So, generally, the cases support the doctrine that if the original taking was wrongful, and sufficient in itself to constitute a conversion, a demand and refusal of possession are not a condition precedent to an action of trover for such conversion.²

§ 329. **Possession Obtained by Mistake or Fraud.** — The motive of a defendant in an action of trover is, as a general rule, immaterial, the question to determine being whether his act has resulted in wrongfully depriving the plaintiff of the use or dominion of his property. This being so, it follows that it is no defense that the defendant acted in good faith and with no intent to wrong plaintiff or intrench upon his property rights. So, in cases where the defendant carried away or otherwise came into possession of plaintiff's property through an honest mistake as to his right or ownership, it has been held that the owner may maintain trover without making a demand for possession.³ This seems one of the harshest rules enforced in the law of conversion, but it can be sustained on the theory of a wrongful taking and depriving the owner of his property without his consent, and in the few cases in which the question has arisen, I believe it has uniformly been decided that, though the taking was through mistake, a demand is unnecessary. Thus, where plaintiff's hay was stored in a depot, and defendant carried it away believing it to be his own, it was held that a demand by plaintiff was not a condition precedent to an action of trover by him for a conversion of the hay.⁴

§ 330. **Same Subject; Demand Unnecessary.** — Much more apparent reason exists for holding it unnecessary to make a demand for possession previous to an action of trover where plaintiff has been deprived of his property by fraud or false representations. Here, there is no question but that such possession was obtained tortiously and is therefore in itself, and from its very inception, a conversion. And the rule being that a demand is never necessary where a conversion can otherwise be shown, it receives a fair exemption in cases where fraud enters into the taking.⁵ Thus, in a case for the conversion of certain goods where it appeared that defendant purchased the goods from plaintiffs through false representations, the court, in sustaining an action of trover, said: "We

¹ *Pilsbury v. Webb*, 33 Barb. 213.

² See, generally: *Stevens v. Curran*, 28 Mont. 366, 72 Pac. 753; *Forth v. Pursley*, 82 Ill. 152; *Scott v. Hodges*, 62 Ala. 337; *Hunt v. Walker*, 12 Heisk. 551; *Fairbanks v. Kent*, 16 Col. App. 35, 63 Pac. 707.

³ *Purves v. Moltz*, 5 Rob. (N. Y.) 653, 2 Abb. Pr. N. S. 409, 32 How. Pr. 478.

⁴ *Bartlett v. Hoyt*, 33 N. H. 151.

⁵ See *Moody v. Drown*, 58 N. H. 45; *Lucky v. Roberts*, 25 Conn. 486.

are now to take it as proved in point of fact to the satisfaction of the jury, that the goods, for which this action of trover is brought, were obtained from the plaintiffs by a sale, but that this sale was influenced and affected by the false and fraudulent representations of the defendant. Such being the case, we think the plaintiffs were entitled to maintain their action without a previous demand. Such demand, and refusal to deliver, are evidence of conversion when the possession of defendant is not tortious; but when the goods have been tortiously obtained, the fact is sufficient evidence of conversion.”¹

§ 331. **Illustrations of Same Subject.** — In another case of trover against one who had obtained the property from a fraudulent purchaser, the court said: “The first point raised by the appellant is, that as the complaint does not allege any tortious or unlawful taking of the property by the defendant, the plaintiffs were bound to aver and prove a special demand and refusal before commencing the action; and a motion for a non-suit was made on that ground and overruled. The case of *Paige v. O’Neal*² is very similar in many of its features to the present one. In that case the court say: ‘It was not essential to aver a demand of the defendant of the wheat in controversy in the complaint, or to prove a demand on the trial. If the property, in fact, belonged to the plaintiff, and it is upon this theory the suit is brought and to this effect the evidence tended when the plaintiff rested — the seizure by the defendant was tortious; and it is a general rule that where the possession of property is originally acquired by a tort, no demand previous to institution of suit for its recovery is necessary. It is only where the original possession is lawful, and the action relies on the unlawful detention, that a demand is required.’ No objection was made by demurrer that a special demand was not averred in the complaint; but the defendant took issue on all the averments. The jury found by their verdict that the property belonged to the plaintiff, and that it was in the defendant’s possession. The defendant’s claim was adverse to that of the plaintiff, and his possession was therefore unlawful from the beginning. He contested the plaintiff’s claim or right to the property all through the action. If he had admitted in his answer the plaintiff’s right to the property, and that he had always been ready to deliver up the property on demand, but that no demand had been made, it might have been a question whether he could

¹ *Thurston v. Blanchard*, 22 Pick. 18, 33 A. D. 700; see *Ryan v. Brant*, 42 Ill. 78; *Bruner v. Dyball*, 42 Ill. 34.

² 12 Cal. 483.

have been compelled to pay the costs of the action. But after contesting the title of the plaintiff, through a litigated suit in which he claimed the title, he cannot escape the effects of an adverse verdict by an objection of this kind."¹ So, demand is necessary where the taking was by a trespasser.²

§ 332. **Where Conversion Previously Occurred.** — The rule being that any one act constituting a conversion is sufficient to sustain an action of trover, it follows that if the defendant has done anything in obtaining possession of personal property tortious as to the owner, or, after obtaining possession, has exercised dominion over it in defiance of the owner's rights, it is not necessary for the plaintiff to show further evidence of a conversion by proving a demand and refusal of possession. As was said in one case, "A demand and refusal are only evidence of a conversion. Where there has been an actual conversion, and it can be proved, no demand is necessary before commencing a suit. It is not every interference with the property of another which constitutes a conversion. One person may remove the property of another person from one place to another place without being guilty of a conversion of it to his own use. He may do it without asserting any claim to it for the benefit of the owner and admitting his title to it. But if one person interferes with the goods of another, and without his consent undertakes to dispose of them as having the property, he does it at his peril; and there need be no manual taking or removal in order to constitute a conversion. It is sufficient if he exercises an authority over the goods against the will and to the exclusion of the owner by an unlawful intermeddling with them, or assumes upon himself the property and right of disposing of them."³

§ 333. **Possession Obtained under Contract.** — Thus, a party to a contract who holds personal property and claims the right thereto under the contract, and asserts that the adverse party has no right to the property, is guilty of a conversion and trover may be maintained against him by his adversary without a previous demand.⁴ And where defendant, although he acquired possession rightfully, did so under a promise to deliver the property, his failure to so return it was held a sufficient conversion to obviate the necessity of demand by the owner.⁵ And where plaintiff had delivered to the owner a

¹ *Sargent v. Sturm*, 23 Cal. 359, 83 A. D. 118; see *Strayhorn v. Giles*, 22 Ark. 517; *Warner v. Vallily*, 13 R. I. 483.

² *Clink v. Gunn*, 90 Mich. 135, 51 N. W. 193.

³ *Webber v. Davis*, 44 Me. 147, 69 A. D. 87.

⁴ *Piazzek v. Harmon*, 98 Pac. 771 (Kan.).

⁵ *Durrell v. Mosher*, 8 Johns. 445; *Hines v. McKinney*, 3 Mo. 382.

sum of money to be loaned by the latter in the former's name, but the latter loaned it in his own name, this was held a conversion and no demand was necessary.¹ And the same is true if one person gives to another a sum of money to pay a certain note and the latter diverts the money to another use.² Likewise, if one holds property of another for a special purpose, but without applying it to such purpose, delivers it to a third person who detains it, both of such persons are liable in trover to the owner without a demand.³ The holder of collateral pledged it for his own debt, and in a suit against the owner of the paper he counter-claimed on the ground of a conversion of the collateral by such re-pledging; the point was made by his adversary that demand had never been made for the notes; but the court held that a conversion had occurred and that a demand was unnecessary.⁴ So, where one delivered her money to another to be put into a savings bank in the latter's name to be drawn out by the former whenever she needed it, and if not drawn out by her prior to her death was to become the property of the latter, but, without the knowledge or consent of the owner, the depositor drew out the money and used it for his own purposes, it was held that these facts constituted a conversion and no demand was necessary as a condition precedent to trover.⁵

§ 334. **Illustrations of Previous Conversions.** — “It is only where no actual conversion has been made by the defendant of the property that it is necessary to make a demand, and that for the purpose of furnishing evidence of a conversion; where there has been an actual conversion by the defendant, a demand is never necessary.”⁶ Where property was taken under an execution issued upon a judgment subsequently reversed, it was held that a demand was unnecessary where the property had not been re-delivered.⁷ So, in an action of trover it appeared that defendant had fraudulently obtained possession of a horse belonging to plaintiff under legal process against a third person, and had later taken the horse out of the state, intending thereby to deprive the plaintiff of his property. It was held that demand was not a condition precedent to an action for the conversion of the horse.⁸ In this case there were two distinct acts of conversion

¹ *Farrand v. Hurlbut*, 7 Minn. 477.

² *Bunger v. Roddy*, 70 Ind. 26.

³ *Hotchkiss v. Hunt*, 49 Me. 213.

⁴ *Richardson v. Ashby*, 132 Mo. 238, 33 S. W. 806.

⁵ *Giles v. Merritt*, 59 N. H. 325.

⁶ *Courtis v. Cane*, 32 Vt. 232, 76 A. D. 174, citing: *Riford v. Montgomery*, 7 Vt. 411; *Grant v. King*, 14 Vt. 367; see *Adams v. Castle*, 64 Minn. 505, 67 N. W. 637.

⁷ *Zimmerman v. Bank*, 56 Ia. 133, 8 N. W. 807.

⁸ *Pine v. Morrison*, 121 Mass. 296.

— an unlawful taking and subsequently exercising dominion in exclusion of the plaintiff's rights — either of which rendered demand unnecessary. The reason given why a demand is not necessary where a wrongful taking or wrongful appropriation has occurred is that, such amounting to a conversion, plaintiff's cause of action thereupon becomes complete and no further act is necessary on his part to perfect it.¹ The rule is otherwise stated to be that, to sustain trover, plaintiff must prove either a refusal to deliver upon a previous demand when the defendant had the goods in his possession and could have complied with the demand, or a fraudulent conversion of the goods before the proper time for a demand, or that the defendant had parted with the goods so as to evade a demand.²

§ 335. **Possession Obtained by One Entitled to It.** — But if property comes into the hands of those who are entitled to its possession, such does not constitute a conversion, and, consequently, a demand must be made by the owner before trover will lie.³ Thus, where a banker indorsed "for collection" to defendant a check deposited in the bank by plaintiff, the amount of the check being paid to defendant by a draft drawn on another bank, and in an action against the drawee to compel payment of the draft the money was paid to the sheriff who absconded with it, it was held that a demand upon the defendant was necessary before an action of trover could be sustained.⁴ The basis of this holding is that the defendant had been guilty of no act amounting to a conversion, since the check had come regularly and lawfully into its possession, and it had subsequently exercised no acts of ownership over it contrary to the rights of plaintiff. And especially is a demand necessary where the defendant owns an interest in the property and it comes into his hands lawfully.⁵ Thus, a demand was held necessary where defendant's husband, long prior to the appointment of plaintiff as the husband's trustee in bankruptcy, had transferred the property to defendant.⁶

¹ *Pease v. Smith*, 61 N. Y. 481, and cases cited; *Dudley v. Sawyer*, 41 N. H. 326; *Hon v. Hon*, 70 Ind. 135; *Porter v. Foster*, 20 Me. 391, 37 A. D. 59; *Bank v. Fiske*, 71 N. Y. 353.

² *Andrews v. Shattuck*, 32 Barb. 396; *Earle v. Van Buren*, 7 N. J. L. 344; *Edmunds v. Hill*, 133 Mass. 445.

³ *Morris v. Bills*, *Wright* (Ohio) 243.

⁴ *Castle v. Bank*, 75 Hun 89, 26 N. Y. Supp. 1035.

⁵ *Moynahan v. Prentiss*, 10 Col. App. 295, 51 Pac. 94.

⁶ *Semon v. Adams*, 79 Conn. 81, 63 Atl. 661; see *Rosenkrantz v. Jacobwitz*, 99 N. Y. S. 469, 50 Misc. R. 580. And in general where a demand has been held unnecessary on account of a prior conversion: *Union Stock Yards v. Mallory*, 157 Ill. 554, 41 N. E. 888, 48 A. S. R. 341; *Easley Lumber Co. v. Lewis*, 121 Ala. 94, 25 So. 729; *Anderson v. Agnew*, 38 Fla. 30, 20 So. 766; *Bonaparte v. Clagett*, 78 Md. 87,

§ 336. **Demand Useless.** — The law never requires, as a condition precedent to its protection, that a person shall do a useless thing. The determination of what is and what is not useless may involve difficulties, but the rule remains the same. So, in applying the principles of the law of conversion with reference to the necessity of a demand and refusal of possession, it is held that no demand is necessary as a condition to maintaining an action for the conversion if it be made to appear that the demand would have been futile or unavailing.¹ As exemplifying this rule, a case arose in which defendant, having in his possession corn belonging to plaintiff, permitted his cattle to consume the corn, and in an action of trover for its conversion the court held a demand unnecessary since, clearly, it would have been useless, the defendant having put it out of his power to comply.² And where defendant had possession of a mare belonging to plaintiff, but, after the termination of the contract under which he held her, sold her and delivered possession to another, it was held that a demand was not essential, as evidently it could not be complied with, the defendant having voluntarily put it out of his power to return the mare.³ And this is the general rule where the property has passed out of the possession and beyond the control of the defendant,⁴ it being further held, however, that even where a demand is made and the defendant has not power to comply, or has not the possession of the property, the action of trover must fail unless the plaintiff can show some distinct act of conversion other than a refusal or failure to deliver on demand;⁵ unless, indeed, it appear that defendant voluntarily put it beyond his power to comply and attempted to avoid the effect of a demand and refusal.

§ 337. **Same Subject.** — So, where plaintiff's watch was in the possession of defendant who was a conditional purchaser thereof, but prior to the payment of installments it was stolen from the defendant, it was held that a demand and failure to deliver possession did not constitute a conversion of the watch.⁶ In such case, there

27 Atl. 619; *Ward v. Transfer Company*, 119 Mo. App. 83, 95 S. W. 964; *Gross v. Scheel*, 67 Neb. 223, 93 N. W. 418; *Carper v. Ridson*, 19 Col. App. 530, 76 Pac. 744; *Merchants Company v. Moore*, 124 Ga. 482, 52 S. E. 802; *Stewart v. Long*, 16 Ind. App. 164, 44 N. E. 63.

¹ *Gottlieb v. Hartman*, 3 Col. 53.

² *Swinney v. Gouty*, 83 Mo. App. 549; see *Freehill v. Hueni*, 103 Ill. App. 118; *Hand v. Scodeletti*, 128 Cal. 674, 61 Pac. 373; *More v. Burger*, 15 N. D. 345, 107 N. W. 200.

³ *May v. O'Neal*, 125 Ala. 620, 28 So. 12; *Ranous v. Hughes*, 42 N. Y. S. 519, 19 Misc. 46.

⁴ *Coombs v. Collins*, 6 Idaho 536, 57 Pac. 310.

⁵ *Whitney v. Slanson*, 30 Barb. 276; *Johnson v. Couillard*, 86 Mass. 446; *Robinson v. Hartridge*, 13 Fla. 501.

⁶ *Sternberg v. Schein*, 71 N. Y. S. 511, 63 App. Div. 417.

had been no conversion previous to demand so as to dispense with demand, and defendant, without fault, having lost possession, the demand and failure to deliver did not render the defendant liable in trover. But, on the other hand, it has been held that where one purchased property which had been stolen, and, without knowledge of plaintiff's ownership, resold it, though never having the actual possession of the property, was liable for it in trover without a demand.¹ Here, no title had ever come to defendant, and he had exercised acts of ownership inconsistent with the plaintiff's rights. But even demand and refusal have been held not to constitute a conversion where at the time the property had been accidentally destroyed. "Demand and refusal do not constitute a conversion to the defendant's own use where, as in this case, it appears that at the time of the demand the bills were not in existence. They had been previously and accidentally destroyed. The failure to deliver that which is not in being and cannot be delivered, furnishes no evidence of an appropriation by the defendant."²

§ 338. *Same Subject.* — Another clear instance of the futility of demand was a case where grain upon which a thresher had a lien for his services in threshing it had been put by defendant into his elevator and mixed with other grain; it is evident that such mixing of grains rendered impossible a return of that on which plaintiff had a claim, and therefore a demand was not necessary.³ However, it has been elsewhere held that where goods have been mixed or intermingled a demand is a condition precedent to an action for their conversion,⁴ although it has been said that if the defendant had notice of the intermingling of plaintiff's property with his own, and make no reasonable effort to replace them or to separate them from his own, he will be held guilty of a conversion without a previous demand.⁵ The criterion in such cases should be whether the intermingling was through the act or fault of the defendant, or without his knowledge. A defendant entirely without fault in the mixing of plaintiff's goods with his own is, as a matter of justice, entitled to a demand and an opportunity to restore such property before being held liable for its conversion.

¹ *Pease v. Smith*, 69 N. Y. 477.

² *Salt Springs Bank v. Wheeler*, 48 N. Y. 492, 8. A. R. 564.

³ *Hahn v. Sleepy Eye Mill. Co.*, 21 S. D. 324, 112 N. W. 843; see *Myrick v. Bill*, 3 N. D. 284, 17 N. W. 268.

⁴ *Bond v. Ward*, 7 Mass. 123, 5 A. D. 38, a case where an officer had attached property among which was some belonging to one other than the defendant. *Burnham v. Marshall*, 56 Vt. 365.

⁵ *Cutter v. Fanning*, 2 Ia. 580; *Robe v. Jourdan*, 46 Tex. Civ. App. 456, 102 S. W. 1167.

§ 339. **Demand Excused by Act of Defendant.** — A defendant entitled to a demand from plaintiff before an action of trover will be sustained in favor of the latter, in such action brought previous to a demand, may so conduct himself as to cure the default on the part of the plaintiff in failing to make demand. This is on the principle of waiver — the voluntary relinquishment of the right, inducing the plaintiff to believe that it would not be insisted upon. In such case the waiver produces the same effect as if demand had been made prior to suit. Thus, where the answer of the defendant admitted that the property had been appropriated by him, it was held that proof of a demand and refusal of possession was unnecessary.¹ And likewise, an answer setting up affirmative matter which showed that a demand for the goods would have been futile, was held to obviate the necessity of showing a demand.²

§ 340. **Chattels Received under Contract of Sale.** — Where goods had been received under a contract of sale, and it appeared that a demand for their possession prior to an action for their conversion would have been unavailing, the plaintiff will, as a general rule, be absolved from the necessity of proving a demand.³ Thus, where plaintiff had sold a horse to defendant who paid part of the purchase-price but refused to pay the balance, an action of trover was brought in a justice's court where defendant's only defense was want of consideration. In the appellate court, the defendant raised the point that plaintiff could not recover without showing a demand for possession prior to suit. But the court, in refusing this contention, said: "We hold that under the facts a demand for the horse would have been unavailing. Muse, the defendant, made no such point on the trial of the case in the justice's court, but relied solely on his defense that the consideration had partially failed. In other words, he claimed that he had paid for the horse as much as it was worth, that he ought not to be compelled to pay more, and that plaintiff ought not to recover the horse from him. If he was honest in this defense, a demand upon him for the horse would have been refused."⁴ But upon the same principle, and following the case just cited, it has been held that where defendant admitted that he had possession, but based his defense on the ground of title in himself and not in plaintiff, a demand by plaintiff was unnecessary, as it would not have been honored.⁵

¹ *Salida, etc. Assoc. v. Davis*, 16 Col. App. 294, 64 Pac. 1046.

² *Hand v. Scodeletti*, 128 Cal. 674, 61 Pac. 373.

³ *Smith v. Schulenberg*, 34 Wis. 41.

⁴ *Muse v. Wright*, 103 Ga. 783, 30 S. E. 662.

⁵ *Grant v. Miller*, 107 Ga. 804, 33 S. E. 671; *Jebes Co. v. Hutchinson*, 171 Ala. 106, 54 So. 618.

3. DEMAND ON PARTICULAR PERSONS

§ 341. **Officers.** — It is a rule of general application that where an officer has wrongfully seized personal property the owner may have his action of trover for its conversion without a prior demand on the officer for its possession. The wrongful seizure may be on account of a void judgment, a defective writ or other irregularity rendering the act of the officer under it a nullity; or he may have seized property of the wrong party; and the points in such cases first to be determined are whether, under the writ, the officer had authority to act, and whether the property seized belonged to the defendant named in the writ. If either of these questions cannot be answered affirmatively, then the seizure was wrongful, the act was tortious amounting to a conversion, and, such conversion having already occurred, a demand on the officer prior to an action of trover is not necessary. Thus, a sheriff, under a writ of attachment, took possession of property belonging to a stranger to the writ, and in an action of trover by the owner the court held a demand not a prerequisite to the action.¹ So, where an officer attached property among which was some belonging to a stranger to the writ; on the same day, and after making the levy, he was notified of this fact, but thereafter removed the property without attempting to separate the goods; the owner thereupon commenced an action of trover against the officer. Afterwards, and before trial of the action of trover, the officer sold the entire property as that of the defendant in the attachment writ. And in the owner's action for the conversion of his goods the court held that a demand for possession was not essential.² Here, two distinct acts of conversion had occurred prior to the trial of the action — one in the wrongful seizure, and the other in the wrongful sale, so that, under the principle that any actual conversion will obviate demand, it was unnecessary for plaintiff to do anything further to perfect his right of action.

§ 342. **Attached Chattels Mixed with Those of Stranger.** — But it has been held that where goods of a stranger to the writ are so mixed with the goods of the attachment debtor that the officer cannot distinguish them, the owner can maintain no action against the officer for taking them until notice and a demand for his goods, and a refusal or delay of the officer in delivering them.³ However, in the

¹ *Woodbury v. Long*, 8 Pick. 543, 19 A. D. 345; *Fairbanks v. Kent*, 16 Col. App. 35, 63 Pac. 707; *Johnson v. Anderson*, 60 Kan. 578, 57 Pac. 513.

² *Gilman v. Hill*, 36 N. H. 311; *Zimmerman v. Bank*, 56 Ia. 133, 8 N. W. 807; *Robinson v. Way*, 163 Mass. 212, 39 N. E. 1009.

³ *Bond v. Ward*, 7 Mass. 123, 5 A. D. 28.

same state where it appeared that plaintiff's property, by his own act, had become so mixed with that of the attachment debtor as to be impossible of identification, an officer attached the whole property as that of the defendant named in the writ, whereupon a stranger whose property was seized notified the officer of his ownership, but thereafter, and with such notice, the officer sold the entire property. In an action of trover against the officer the court said: "But the difficulty of this case, now as before, arises from the intermingling of the chattels sold to the plaintiff and those afterward purchased and put in the house by the vendor. If the owner of a part can distinguish and point out to the officer what belongs to him, the officer will be a trespasser if he should take it, but he is obliged to attach the goods of the debtor, notwithstanding they may be so mixed; and it is the business of the owner who has allowed them to become so confused to separate his own from the debtor's. In this case it was the debtor who caused the mixture; but he was placed in a situation to do this by the vendees. They do not lose their property thereby if they can prove it. They may, after an attachment, identify their goods, give notice to the officer and demand a re-delivery of them; but until they do that, the officer is not in fault, and cannot be considered a trespasser.

"But the question arises whether the plaintiffs shall lose their property altogether because they were unable to distinguish it from other articles of the same description owned by the vendor. If there were a fraudulent collusion between the vendor and vendees to embarrass the sheriff and prevent him from attaching the property of the debtor this consequence might follow; but on the supposition of an honest inability to distinguish, it would be harsh. There is nothing in the case to justify us in taking the ground that their conduct was collusive. The officer was not a trespasser in taking the goods, as he was bound to take the goods of the debtor. But could he sell them without being liable for their value? In the action of trover, proof of property and conversion is sufficient. The proof is clear that property of the plaintiffs was taken. This taking under the circumstances may not have been a conversion. But the officer was made to know that divers of the articles were claimed by the plaintiffs, and the bill of sale was shown to him before he sold. He chose to sell the whole, having it in his power to require indemnity, and probably taking it. Finding that there were many articles of the same kind, he would have been justified under the circumstances in selecting from the whole quantity in his hands enough to correspond with the bill of sale; and if he retained the most valuable, no

fault could have been found with him. He should have set aside as many articles as appeared by the bill of sale to belong to the plaintiff, and sold the residue; for he had notice of the claim, and the evidence was shown to him. In the case of *Bond v. Ward*,¹ which has been cited, it was held that no action lies against an attaching officer under such circumstances without a demand and refusal; that is, he cannot be a trespasser or liable in trover without such demand. This applies to the taking. If he sells, knowing the property to be the plaintiff's the sale is a conversion."²

§ 343. **Wrongful Purchaser.** — There is some divergence of authority on the question whether the owner of property wrongfully sold is required to make demand for possession on the purchaser before holding him liable for its value in trover. Many cases hold that such demand is unnecessary, and the taking of the property into possession by the purchaser is in itself wrongful and constitutes a conversion, so that the owner's right of action is perfect without any further step by him. The following dissertation is taken from a well-considered Oregon case and presents this side of the question very fully.³ At first blush it may seem strange that one who takes possession of goods or chattels under a contract of purchase, from one who had no right to sell, should be treated as a wrong-doer; but the explanation of the principle lies in the common law maxim *caveat emptor*, which applies to the transfer of personal property. It is the buyer's own fault, if he is so negligent as not to ascertain the right of the vendor to sell, and he cannot successfully invoke his *bona fides* to protect himself from liability to the true owner, who can only be divested of his rights or title to his property by his own act, or by the operation of law. Every person is bound at his peril to ascertain in whom the real title to property is vested, and however much diligence he may exert to that end, he must abide by the consequence of any mistake.⁴

§ 344. **Same Subject.** — Nothing can be plainer than that "no one can sell a right when he himself has none to sell, and that every such wrongful sale, by whomsoever made, whether by thief or bailee, is in derogation of the rights of the owner and in hostility to his authority, and consequently they neither acquire themselves nor

¹ 7 Mass. 123, 5 A. D. 28.

² *Shumway v. Rutter*, 8 Pick. 443, 19 A. D. 340; see, generally, *Smith v. Smalley*, 19 N. Y. App. Div. 519, 46 N. Y. Supp. 277; *Lux v. Davidson*, 56 Hun 345, 9 N. Y. Supp. 816; *Robinson v. McDonald*, 2 Ga. 116.

³ *Velsian v. Lewis*, 15 Ore. 539, 16 Pac. 631, 3 A. S. R. 184.

⁴ *Gilmore v. Newton*, 9 Allen (Mass.) 171, 85 A. D. 749; *Sprights v. Hawley*, 39 N. Y. 141, 100 A. D. 452; *Hotchkiss v. Hunt*, 49 Me. 213.

confer on the purchaser any right or title of such owner. Mere possession of another's property affords no evidence that the person having such possession has power to sell it, and he who purchases or intermeddles with it must see to it that he is protected by the authority of one who has power to sell."¹ A possession taken under a purchase from one without title, and who has himself been guilty of a conversion in disposing of the goods or chattels, is a possession unauthorized and wrongful at its inception, and which the absence of evil intent in the purchasers cannot make rightful or lawful. Such a possession is based on the assumption of the right of property or a right of dominion over it derived from the contract of sale; and what is this, in the legal sense, but a wrongful intermeddling or asportation, or detention of the property of another? At common law, a conversion is that tort which is committed by a person who deals with chattels not belonging to him in a manner which is inconsistent with the rights of the lawful owner.² "Any distinct act of dominion wrongfully exerted over one's property in denial of his right or inconsistent with it is a conversion."³ It consists in the exercise of dominion and control over the property inconsistent with and in denial of the rights of the true owner, or the party having the right of possession. Said Shepley, J.: "The exercise of such a claim of right or dominion over the property as assumes that he is entitled to the possession, or deprives a party of it, is a conversion."⁴

§ 345. **Whether Wrongful Purchase is a Conversion.**—The defendants, by taking possession under their purchase, assumed that ownership and exercised a dominion over the property inconsistent with the rights of plaintiff as owner. "The very act," said Lord Ellensborough, "of taking goods from one who has no right to dispose of them is a conversion", and he held the action of trover maintainable.⁵ "And again", said the same learned judge, "the very assuming to one's self the property and right of disposing of another man's goods is a conversion; and certainly a man is guilty of a conversion who takes my property by assignment from another who has no authority to dispose of it; for what is that but assisting the other in carrying his wrongful act into effect?"⁶ The taking possession of personal property under a contract of purchase is an act based on the assumption of ownership, or a right of dominion over the

¹ *Dixon v. Caldwell*, 15 Ohio St. 412, 86 A. D. 487; *Cooper v. Newton*, 45 N. H. 339.

² *Rapalje & Lawrence's Dictionary*.

³ *Cooley, Torts*, 428; *Ramsby v. Beezley*, 11 Ore. 51, 8 Pac. 288.

⁴ *Fewald v. Chase*, 37 Me. 290.

⁵ *Hurst v. Gwennap*, 2 Stark. 306.

⁶ *McCombie v. Davies*, 6 East. 538.

thing converted, where the vendor is without title, and although without evil intent, is a conversion for which trover lies without previous demand. The intent with which the wrongful act is done on the part of the defendant is not an essential element of the conversion. It is enough that the true owner has been deprived of his property by the unauthorized act of some person who assumes dominion or control over it. It is the effect of the act which constitutes the conversion.¹ Hence the conversion may consist simply of a purchase, even by an innocent party, of goods or other personal chattels from one who has himself been guilty of a conversion in disposing of them when the buyer takes the goods into his possession or custody. The authorities to this effect are numerous and overwhelming. As trover and replevin are concurrent remedies for the owner whenever the taking is wrongful, any case in which replevin without a demand has been supported is authority for the maintaining of trover. In one case the plaintiff, being the owner of a horse, bailed him to A for use for a limited time, under the expectation of a purchase by the latter. During the time, A, for a valuable consideration and without notice, sold the horse to B, and he in like manner to the defendant. Held that no previous demand was necessary to enable the plaintiff to maintain replevin against the last purchaser. The court said: "Whoever takes the property of another without his assent, expressed or implied, or without the assent of some one authorized to act in his behalf, takes it in the eye of the law tortiously. That is unlawful which is not justified or warranted by law; and of this character may be some acts which are not attended with any moral turpitude."²

§ 346. **Same Subject; Is Generally a Conversion Itself.** — In another case,³ it was held that a party purchasing property from one who had no right to sell, and holding it to his own use, is guilty of a direct act of conversion, without any demand and refusal. Parker, C. J., said: "The purchase by the defendants, taking possession as they appear to have done, and holding it as their own property was a conversion. They received the possession from one who had no right to deliver it to them, under a sale which purported to vest the title in them; and they by their purchase undertook to control it as their own property. This was an assumption of power over it, inconsistent with the rights of the plaintiff. Purchasing property

¹ Edwards, Bailments, § 162; Cooley, Torts, 534, 538, 688; *Flanders v. Colby*, 28 N. H. 34; *Boyce v. Brockway*, 31 N. Y. 490; *Morrill v. Moulton*, 40 Vt. 242.

² *Galvin v. Bacon*, 11 Me. 29, 25 A. D. 258.

³ *Hyde v. Noble*, 13 N. H. 494, 38 A. D. 508.

from one who had no right to sell, and holding it to their own use, is a direct act of conversion without any demand and refusal. Their possession was unlawful from its inception, by reason of the want of authority in Kenniston to make the transfer. It is only where the party obtains the possession lawfully that it is necessary to show a demand and refusal." In *Freeman v. Underwood*, 66 Me. 233, the court says: "But the defendants by the purchase and possession of the berries, although acting in good faith and in ignorance of the want of title in their vendors, assumed thereby an ownership and exercised a dominion over the property, which rendered them liable in trover to the true owner, without any demand therefor." In *Farley v. Lincoln*, 51 N. H. 579, 12 A. R. 182, the court say: "At the time of the assignment, the plaintiffs were the absolute general owners and were entitled to the immediate possession of the goods. The assignment passed no title and conferred no right upon the defendant in respect of the goods as against the plaintiffs for the obvious reason that Sanborn had no right or title in them as against the plaintiffs which he could confer on anybody. This being so, the first act of possession exercised by the defendant over them was inconsistent with and in derogation of the plaintiffs' rights. Absolute ownership draws possession after it. If, then, the defendant's act in taking possession was an interference with the plaintiffs' right of actual possession growing out of the ownership, it was in legal effect a disturbance of their constructive possession. The defendant's act in assuming dominion over the property is none the less an invasion of the plaintiffs' rights and none the less a trespass because he did not intend a wrong, or know that he was committing one. An encroachment upon a legal right must constitute a legal wrong; and it is familiar law that intention is of no account in a civil action brought by one man to recover damages for a wrongful interference with his property by another."

§ 347. **Demand on Bona Fide Purchaser.** — In *Stanley v. Gaylord*, 1 Cush. 536, 48 A. D. 643, which is a leading case, it was held that a *bona fide* purchaser from one who had the actual possession of property, but without any right to retain the property as against the lawful owner, by his actual taking of it under such purchase into his custody would thereby subject himself to an action of trover at the suit of the lawful owner without any previous demand for the possession. In *Trudo v. Anderson*, 10 Mich. 358, it is held that where one's property is disposed of without authority by the person having it in charge, the owner may bring replevin therefor without a previous demand, and that he may do this notwithstanding the property

is in the hands of one who has purchased it in good faith and without notice of the title of the true owner. "Why", said Christian, J., "should the right of the plaintiff to recover his property be made to depend upon the good faith of the defendant when the good faith is no defense against the plaintiff's right of property or possession where a previous demand has been made? . . . We do not think the question of good faith or intent in a party receiving possession from a wrongful taker in such cases, and where the owner has been guilty of no negligence or wrong, can have any bearing on the right of recovery in a civil suit for property or its value; and such is clearly the weight of authority both in England and the United States."

§ 348. **Same Subject.** — And in a late case in the same state,¹ it was held that trover for goods sold without the owner's authority or ratification may be brought against the purchaser without formally demanding the goods beforehand. In *Wells v. Ragland*, 1 Swan 501, it is held that where the possession of property is obtained from one who had no right to transfer it, a right of action by the owner against the transferee accrues as soon as the latter acquires possession of it; that the bare taking possession under such circumstances constitutes a new conversion, and that from the time of the commission of that act the statute will commence running. In *Harpending v. Meyer*, 55 Cal. 557, it was held that when the possession of property is obtained — in good faith or otherwise — from one who has no right to transfer it, a right of action by the owner against the transferee accrues as soon as the latter acquires possession, and no demand or further act of conversion is necessary. And it may be said generally that the weight of authority supports the doctrine that as against a purchaser from one who had no right to sell, a demand for possession is not a condition precedent to the right to maintain trover.²

§ 349. **Same Subject; Good Faith Immaterial.** — Upon principle, it is not easy to give a satisfactory reason why the true owner, who has been guilty of no wrong or negligence, should be prejudiced by

¹ *Hake v. Buell*, 50 Mich. 90, 14 N. W. 710.

² *Parsons v. Webb*, 8 Greenl. 38, 22 A. D. 220; *Whipple v. Gilpatrick*, 19 Me. 427; *Bodick v. Coburn*, 68 Me. 170; *Prime v. Cobb*, 63 Me. 202; *Ripley v. Power Company*, 11 Cush. 11; *Chapman v. Cole*, 12 Gray 141, 71 A. D. 739; *Heckle v. Lurvey*, 101 Mass. 344, 3 A. R. 366; *Bearce v. Bowker*, 115 Mass. 129; *Gibbs v. Jones*, 46 Ill. 319; *Whiteman Company v. Trittle*, 4 Nev. 494; *Ward v. Carson Company*, 13 Nev. 44; *Johnson v. White*, 13 Smedes & M. (Miss.) 584; *Shoemaker v. Simpson*, 16 Kan. 52; *McNeill v. Arnold*, 17 Ark. 154; *Carey v. Bright*, 58 Pa. St. 70; *Bucklin v. Beale*, 38 Vt. 653; *Oleson v. Merrill*, 20 Wis. 487, 91 A. D. 428; *Harker v. Dement*, 9 Gill 7, 52 A. D. 670; *White S. M. Co. v. Betting*, 46 Mo. App. 417; *Lowry v. Beckner*, 44 Ky. (5 B. Mon.) 41; *Dunham v. Converse*, 28 Wis. 306.

a transaction between the wrongful taker of his property and a third person, or how such a transaction can impose on him a new obligation. Having been guilty of no act impairing, or in any manner qualifying, either his right of property or his right of immediate possession, he may assert such right wherever and whenever he finds his property. The wrongful taker had no rightful possession against the true owner and he could convey none to another. So, the owner, being deprived of his property and its possession by the tortious, if not felonious, act of another, is yet not deprived of his rights in and to the property, and a purchaser, whose claim originates through the wrongful taking, can obtain no greater right than his vendor had. The property remains to the real owner as absolutely after as before the sale, and the purchaser's possession being without authority, no demand upon him is necessary before an action of trover can be maintained by the owner.¹ Thus, where an owner of personal property loaned it to another and the latter sold it to defendant, it was held that a demand was not a condition precedent to an action of trover by the owner against the purchaser.² And a demand is not necessary where defendant buys from plaintiff's agent who has no right to sell.³ Neither was it a prerequisite where an agent purchased from a woman property belonging to her husband, took possession of it and turned it over to his principals.⁴ And where the defendant had purchased the goods from a conditional vendee, treated and claimed the property as his own, and stated to the owner that he must look to the original vendee for payment, it was held that it was not incumbent on plaintiff to prove a demand and refusal of possession. In passing on the question, the court said: "It is insisted by the counsel for the plaintiff-in-error that where goods come to the hands of a party by delivery, finding or bailment, an actual demand and refusal must be proved. This position is certainly correct where there is no evidence of an actual conversion. In such case, a refusal to deliver the goods, when demanded, would be the only evidence of a conversion; and, as the plaintiff must prove a conversion of the property by the defendant, in the absence of other evidence of that fact, a demand and refusal to deliver it must be proved. But there is certainly no necessity for other proof, the only

¹ *Rosum v. Hodges*, 1 S. D. 308, 47 N. W. 140, 9 L. R. A. 817; *Brisben v. Wilson*, 60 Pa. St. 452.

² *Blakely v. Ruddell*, Fed. Cas. No. 18, 241.

³ *Lowry v. Beckner*, 44 Ky. (5 B. Mon.) 41.

⁴ *Rice v. Yocum*, 155 Pa. 538, 26 Atl. 698; *Cox v. Reynolds*, 7 Ind. 257; see *Geneva Wagon Co. v. Smith*, 188 Mass. 202, 74 N. E. 299; *Gilmore v. Newton*, 91 Mass. 171, 85 A. D. 749.

effect of which is to establish the fact of a conversion when that fact is sufficiently established by other evidence.”¹

§ 350. **Same Subject.** — Where an assignee of an insolvent brought trover against a creditor of his assignor and it appeared that the creditor had bought the property in fraud of law and applied it in payment of his debt, this was held an act of conversion which rendered it unnecessary to make demand upon him prior to suit.² And where defendant had received in exchange a horse belonging to plaintiff, but without knowledge of plaintiff's ownership, and after learning of same continued to claim and use the horse, this was held a conversion and a demand by plaintiff before suit was unnecessary.³ So, where defendant had in good faith purchased and sold plaintiff's property which had been stolen, it was held that no demand was necessary even though defendant believed that his vendor had the right to sell.⁴

§ 351. **Some States Hold Demand Necessary Against Innocent Purchaser.** — But the rule that a demand is unnecessary in such cases is not without dissent. In New York, and followed in one or two other states, a contrary doctrine has been established, especially where it appeared that the purchaser acted in good faith in buying the property. Thus, in an early New York case the rule was announced that a purchaser from one who has no authority to sell is entitled to a demand from the owner as a prerequisite to suit.⁵ This case has been adhered to in other adjudications in the same state, although Cowen, J., in delivering the opinion of the court in one of them said: “I will not, however, deny that an exception in favor of the taker, where he is a *bona fide* purchaser from the wrong-doer, has found its way into the books; nor that, however discordant it be with established principles, it may at least in this state, have become too inveterate to be displaced.”⁶ So, in an action for conversion it appeared that defendant had hired a mule from plaintiff's agent, ignorant of plaintiff's ownership, and that the mule died while in the defendant's possession. It was held that plaintiff could not recover as a demand and refusal where necessary as against one who received possession in good faith believing that he from whom it was received had authority to deliver.⁷ And it was held that a purchaser

¹ *Houston v. Dyche*, Meigs (Tenn.) 76, 33 A. D. 130; *Jewett v. Partridge*, 12 Me. 243, 28 A. D. 173.

² *Crampton v. Valido Marble Co.*, 60 Vt. 291, 15 Atl. 153, 1 L. R. A. 120.

³ *Porter v. Foster*, 20 Me. 391, 37 A. D. 59; *Buel v. Pumphrey*, 2 Md. 261, 56 A. D. 714; *Jamison v. Hendricks*, 2 Blackf. 94, 18 A. D. 131.

⁴ *Courtis v. Cane*, 32 Vt. 232, 76 A. D. 174.

⁵ *Storm v. Livingston*, 6 Johns. 44.

⁶ *Barrett v. Warren*, 3 Hill (N. Y.) 348.

⁷ *Honey v. Bromley*, 85 Hun 540, 33 N. Y. Supp. 400.

who acted in good faith in the buying of goods at execution sale when they had been found in the possession of the judgment debtor, was entitled to a demand.¹ And the same rule was adhered to where the goods had been stolen and sold to plaintiff's wife.²

§ 352. **Same Subject.** — The New York rule above announced has apparently been followed in Indiana. Thus it has been there held that the mere purchase of goods from one who had no authority to sell them does not constitute a conversion, unless the purchaser afterward refuses to return them to the owner on demand, or has converted them to his own use so that he cannot return them if requested.³ So, in Minnesota it has been held that where one received, in good faith, goods from another who had no right to deliver them, but of which fact the transferee had no knowledge, plaintiff must show that he made demand for possession before he can sustain an action of trover.⁴ And in Maryland where it appeared that defendant purchased property from one to whom the plaintiff's intestate conveyed it, it was said that his possession was held under the contract and that trover would not lie for the value of the property until after demand and refusal of possession.⁵

§ 353. **Doctrine of these Courts Repudiated.** — The Wisconsin court, in referring to the New York doctrine requiring a demand in such cases, has said: "But we find a decided weight of authority the other way, and we are satisfied that the New York rule is not sound in principle."⁶ But the court of Michigan, noticing the apparent equity of the rule where the purchaser was clearly acting in good faith, makes this observation: "The principle upon which the New York rule rests might properly have some weight with the court upon the question of costs where these are discretionary, or might justify the legislature in refusing costs to the plaintiff where a previous demand could have been made without serious risk or inconvenience, and the suit has been brought without such demand; but we think the principle of the rule cannot properly be extended to the right of action."⁷ And even the New York courts do not go to the extent of requiring a demand as against a purchaser who was

¹ *Rawley v. Brown*, 18 Hun 456.

² *Gurney v. Kenny*, 2 E. D. Smith 132; see *Jackson v. Chapman*, 60 N. Y. S. 270, 29 Misc. 129.

³ *Valentine v. Duff*, 7 Ind. App. 196, 34 N. E. 453; *Wood v. Cohen*, 6 Ind. 455; *Sherry v. Picken*, 10 Ind. 377; see *Torian v. McClure*, 83 Ind. 312; *Roberts v. Morris*, 67 Ind. 391.

⁴ *Plano Mfg. Co. v. N. Pac. Elevator Co.*, 51 Minn. 167, 53 N. W. 202.

⁵ *Stewart v. Spedden*, 5 Md. 433; see *Metcalfe v. Dickman*, 43 Ill. App. 284; *Gillett v. Roberts*, 57 N. Y. 28.

⁶ *Eldred v. Oconto Co.*, 33 Wis. 133; see *Smith v. McLean*, 24 Ia. 322.

⁷ *Trudo v. Anderson*, 10 Mich. 357.

not acting in good faith in making a purchase of personalty from one who had no right to sell. Thus, where goods were obtained originally by permission of the owner, but the permission resulted from such deceit that the transaction was voidable, it was held that no demand was necessary, the court saying that in the absence of proof that defendant obtained the goods in good faith and for a lawful purpose, no demand need be made before the bringing of trover by the owner.¹

§ 354. **Bailees.** — The principles in this chapter already set forth are applicable to bailees. Unless an actual conversion by a bailee be shown, an action of trover against him will not lie without a previous demand for the goods and a failure to deliver.² This is consonant with the rule that the action of trover must be based upon a conversion, and simply having the property in his possession is no evidence of a conversion, and no other positive, tortious act having been committed by the bailee, a demand and refusal to deliver is a prerequisite showing to entitle the owner to recover in trover. But a demand is not essential where some other act constituting a conversion can be shown, as where the property bailed has been destroyed, mis-used or disposed of by the bailee so that it is impossible for him to re-deliver it.³ In such case, the bailee has repudiated his obligation to his bailor, thereby terminated the agreement of bailment, and no further act is necessary on the part of the bailor to perfect his right of action.⁴

§ 355. **Illustrations of Same Subject.** — Thus, where suit was brought for the conversion of a refrigerator and three show-cases, it appeared that the defendant had bought a stock of goods, which included the articles in suit. He disposed of these articles along with a cash register and a pair of scales, to one Richards for a consideration presently paid, agreeing to keep them stored subject to Richards' order. Afterward, Richards sold them to Graham who, in turn, sold them to plaintiff. Still later, and before this suit was brought, defendant sold the refrigerator to a grocery company, and caused the show-cases to be removed to a warehouse where, when the owner of the warehouse went into bankruptcy, they passed again into the hands of Richards who purchased that company's stock of goods and fixtures at a sale ordered by the bankruptcy court. In

¹ *Tallman v. Turck*, 26 Barb. 167; *Seneca Nation v. Hammond*, 3 Thomp. & C. 347.

² *Loveless v. Fowler*, 79 Ga. 134, 4 S. E. 103, 11 A. S. R. 407; *Moore v. Refrigerator Company*, 128 Ala. 621, 29 So. 447.

³ *Proctor v. Cole*, 66 Ind. 576; *Bunger v. Roddy*, 70 Ind. 26; *Badger v. Hatch*, 71 Me. 565; *Kelsey v. Griswold*, 6 Barb. 436; *Grant v. King*, 14 Vt. 367; *Warner v. Dunnavan*, 23 Ill. 380.

⁴ *People's Bank v. Missouri, etc. Ry. Company*, 158 Mo. App. 519, 138 S. W. 915; *Lovejoy v. Jones*, 30 N. H. 164.

the course of decision, the court say: "Again, the appellant insists that plaintiff was not entitled to recover for the reason that no demand was made upon him for the property prior to suit brought and that, since his possession was acquired rightfully, a demand was necessary to convert his holding into the positive tortious act which is an essential ingredient of conversion. Generally in such cases a demand is necessary. But here defendant, by disposing of the property, had repudiated his obligation as bailee, and had wrongfully assumed dominion and control over it to the exclusion of the rights of Richards and those who might claim under him, including the plaintiff; and the plaintiff was entitled to recover in trover, if at all, upon that conversion then past cure except by a judgment awarding damages."¹

§ 356. *Same Subject.* — A special verdict had been found in a case stating in substance that in June, 1788, the plaintiff loaned to the defendant's testator thirty barrels of resin; that the defendant's testator died in December, 1790, and the writ was taken out in June, 1792. The court said: "Where a promise is to pay a sum of money, but no time is mentioned, it is due presently, and an action lies without any request. But where, under the like circumstances, a promise is made to deliver goods, or to do a collateral act, it is necessary that the party to whom it is to be done, should make a demand of the promissor before an action is brought. Though no express promise be made in the present case, the law implies that the borrower should restore in kind the thing borrowed, on request, or pay its value; but to maintain a suit for the latter, the request is indispensably necessary."² "Whether a demand should be made in cases of bailment, prior to suit, depends upon stipulations as to time for the return of the property. The return must be made at the time contemplated in the contract. If the property be detained beyond that period, no demand would be necessary in order to sustain an action for its recovery. It is not one of the obligations of the lender that he shall at the expiration of the loan go after and bring back his property, but it is the duty of the borrower to restore it according to his stipulations. If no time is fixed for the return, then a demand might be necessary as a prerequisite to the action."³

¹ *Shriner v. Meyer*, 171 Ala. 112, 55 So. 156, citing *Brown v. Beason*, 24 Ala. 466; *Rhodes v. Lowry*, 54 Ala. 4; *Dixie v. Harrison*, 163 Ala. 304, 50 So. 284; see *Easley's Ex. v. Easley*, 18 B. Mon. 86.

² *Benner v. Howard's Ex.*, Tay. 149 (N. C.), 1 A. D. 583.

³ *Clapp v. Nelson*, 12 Tex. 370, 62 A. D. 530; see *Ross v. Clark*, 27 Mo. 549; *Waring v. Penn. Railway Co.*, 76 Pa. St. 491; *Hon v. Hon*, 70 Ind. 135; *Hill v. Freeman*, 3 Cush. 257.

§ 357. **Partners.** — The general rules announced at the beginning of this chapter as to when a demand is or is not necessary as a condition precedent to an action of trover for the conversion of goods and chattels, apply when a conversion is claimed against a partnership, and it is only necessary to here reiterate that a demand is, generally, necessary where the partnership came lawfully into possession of the property involved and thereafter committed no act amounting to an actual conversion of it; and, conversely, if the partnership came into possession without authority, or, having come rightfully into possession, thereafter committed some act amounting to a conversion, a demand is unnecessary to fix liability upon the partnership in trover. Upon whom demand should be made, and how far a demand on one partner is binding upon his associates, will be discussed in future sections of this chapter.

§ 358. **Co-tenants.** — As between co-tenants — or one of them — and a third person, the general rules of demand and refusal apply, and where such third person is charged with a conversion of the property constituting the subject-matter of the co-tenancy, a demand and refusal of possession must be shown if he came lawfully into possession of the property and has since used it in a manner consistent with the terms upon which he received it; but if it be shown either that he obtained it wrongfully, or, after a rightful possession, used it in a manner inconsistent with or in denial of the rights of the owner, then a demand is unnecessary. In other words, if an actual conversion be otherwise shown, an action of trover may be maintained without a previous demand of possession.

§ 359. **Same Subject; Where Actions between Co-owners.** — In actions between the joint-owners themselves, the same general rules apply. But here the possession of one is, until a division or other agreement, the possession of all; or, otherwise said, any one of the joint-owners is, during the existence of the relation, entitled to the possession. And, ordinarily, one must demand of the other possession of his share and be refused before he can maintain against such other the action of trover for a conversion of the property. But one case has come within my observation in which the question has been specifically presented as to whether a demand is a necessary prerequisite in the situation under discussion.¹ But on principle, it should be held that where one co-owner has done nothing with the common property inconsistent with or in denial of the rights of the other more than to remain in exclusive possession, such other should

¹ Waller v. Bowling, 108 N. C. 289, 12 S. E. 990, 12 L. R. A. 261.

be required to show that the property is capable of division, that he has demanded his share, and that such demand has not been honored, before being permitted to maintain trover. And, on the other hand, it being shown that the common property is susceptible of division, and that one being in exclusive possession, has denied the rights of his co-owner therein or has by his wrongful act made it impossible to deliver the other his share, a showing of demand and refusal should not be required as a prerequisite to the action of trover. As illustrative of this — although the exact point did not there arise — a case was presented in which it appeared that under an agreement between joint-owners of a quantity of logs, one was to deliver them at a certain point on the river to be there divided; in violation of this agreement, he ran them past this point to a place much farther down the river from which it was practically impossible to get them back to the place agreed upon for a division, and at the place where he conveyed them, claimed the whole as his own and denied the plaintiff any interest in them; such facts were held to be a conversion; and following the general principle that it is necessary for plaintiff to show only one act of conversion to sustain his action of trover, a demand for possession would have been superfluous.¹

§ 360. **Agents.** — It is the general rule that where an agent has handled his principal's goods in a manner inconsistent with the terms of the agency so that his acts constitute a conversion, trover may be maintained by the principal without a previous demand upon the agent. Thus, where a servant wrongfully took away some of his master's goods upon leaving his service, it was held that a demand was not essential prior to bringing trover by the principal.²

§ 361. **Same Subject; Money Received for Principal.** — No action can, ordinarily, be maintained against an agent for money received by him for his principal until after a demand has been made upon him for its payment, with which he has refused or neglected to comply.³ But where so long a time has elapsed since the collection of the money as to rebut the presumption that payment was delayed for some sufficient cause, the agent may well be considered as having appropriated it to his own use, and then neither law nor reason requires that before he can be sued for his non-feasance, he should be requested to do what his conduct sufficiently indicates his determination not to do.⁴ So, no demand is necessary where the agency

¹ *Ripley v. Davis*, 15 Mich. 75, 90 A. D. 262; see also *Fiquet v. Allison*, 12 Mich. 330, 86 A. D. 54.

² *Pilsbury v. Webb*, 33 Barb. 213; see *Haas v. Dawson*, 9 Ia. 589.

³ *Mechem, Agency*, 551 and cases cited.

⁴ *Id.*, citing *Bedell v. Janney*, 9 Ill. 193.

is denied, or a claim is set up exceeding the amount collected, or the agent's responsibility is disputed.¹ And where the principal placed in the hands of his agent a sum of money which the latter was to loan or invest in the name of his principal, but in violation of the terms of the agency he loaned it in his own name and for his own use and benefit, it was held that such act amounted to a conversion and that the principal could maintain trover without a previous demand."² "As a general rule, where money is placed in the hands of an agent to loan for a principal, the act of the agent in handling the money is the act of the principal, and as to such money the relation of debtor cannot exist and only commences on the termination of the agency; but where the agent violates his instructions and converts the money to his own use, a different rule prevails and his principal may at once sue and recover it of him without demand."³

4. REQUIREMENTS OF DEMAND

§ 362. **General Principles.** — A demand, in order to suffice as evidence of a conversion by him who has refused to honor it, must be so specific as to the property desired as to leave no doubt of its identity. And ordinarily the demand must not include more property than the demandant is entitled to; although the courts are not in complete harmony as to whether a demand embracing more property than the demandant is entitled to is sufficient as to that part to which he is entitled. The doctrine has been declared that a demand of too great a scope is insufficient as to all the property claimed.⁴ This doctrine is tenable in cases where the articles demanded are severable and of different kinds, quality or value, because in such case the defendant is entitled to know which ones the plaintiff claims; but no satisfactory reason appears why a demand including more than the demandant is in fact entitled to should not be sufficient as to those he rightfully should have, where the articles are capable of segregation and are of like quality or value. Thus, it was held where plaintiff's demand was shown to have covered more than he was entitled to, that the defendant was not justified on this account in refusing to deliver that part which plaintiff rightfully should have had, unless the latter refused to accept anything less than all de-

¹ *Mechem, Agency*, citing *Waddell v. Swann*, 91 N. C. 108; *Wiley v. Logan*, 95 N. C. 358.

² *Farrand v. Hurlburt*, 7 Minn. 477; *Dodge v. Perkins*, 9 Pick. 368; *Drexell v. Ramond*, 23 Pa. St. 21.

³ *Bartels v. Kimenger et al.*, 144 Mo. 370, 46 S. W. 163; see *Etter v. Bailey*, 8 Pa. St. 442; *Chapman v. Burt*, 77 Ill. 377; *Ainsworth v. Partillo*, 13 Ala. 460; *Terrell v. Butterfield*, 92 Ind. 1.

⁴ *Forth v. Pursley*, 82 Ill. 152; *Swartout v. Evans*, 37 Ill. 442.

manded.¹ But perhaps the best solution of the question was reached in a Massachusetts case where it was held that such a refusal by the defendant was not that assumption of control or dominion over the property to the exclusion, or in defiance of the rights of the plaintiff which *ipso facto* worked a conversion; but that it was a question for the jury, under all the circumstances, to be determined as any other fact, whether the defendant's refusal to deliver all the property demanded was such a clear refusal to deliver that to which the plaintiff was entitled as to amount to a conversion.²

§ 363. **Demand must be Definite.** — The demand, to place defendant in the wrong, must be clear and absolute in its terms and leave nothing to conjecture.³ Thus, it was held that a showing by plaintiff that he had written a letter asking a return of the goods but without showing an acknowledgment of or a reply to his letter, was not sufficient.⁴ And where it appeared that plaintiff had demanded certain articles at some distance from where they were located and promised to furnish an inventory of them, but plaintiff did not show that he had in fact furnished the inventory, it was held that the demand was insufficient as a basis for trover.⁵ And a demand was likewise held insufficient where it was qualified by the expression: "I shall have to take the property from you if I cannot get my money any other way."⁶ So, where a bank sent to the defendant for collection a check for which defendant received in payment the draft of the drawee, it was held that neither a telegram from the drawer of the check instructing defendant to hold the draft, nor an inquiry from the bank upon which the check was drawn as to whether defendant could hold the draft, was a sufficient demand.⁷

§ 364. **Is Sufficient if Intention Understood.** — But a demand will be sufficient upon which to predicate an action of trover if by the reasonable import of the terms used the one in possession is apprised of what the owner is demanding. Thus, a demand for the keys of a building in order to get goods therefrom is a sufficient demand for the property.⁸ And it has been held that a demand for payment for goods already converted will sustain an action of trover,⁹

¹ Gragg v. Hull, 41 Vt. 217.

² Delano v. Curtiss, 7 Allen (Mass.) 470. But a late case in Colorado holds such refusal to be a conversion: Carper v. Risdon, 19 Col. App. 530, 76 Pac. 744.

³ Cumberland Tel. Co. v. Taylor, 44 Ind. App. 27, 88 N. E. 631.

⁴ Miller v. Smith, 1 Phila. 173.

⁵ Breese v. Bange, 2 E. D. Smith 474.

⁶ Monnot v. Ibert, 33 Barb. 24.

⁷ Castle v. Corn Exchange Bank, 148 N. Y. 122, 42 N. E. 518.

⁸ Swartz v. Brewing Co., 109 Md. 393, 71 Atl. 854.

⁹ La Place v. Aupoix, 1 Johns. Cas. (N. Y.) 406.

although it would seem that by demanding payment the owner would thereby ratify the act of conversion or at least waive the tort and that his action should then be in assumpsit. And in an action against an officer for wrongfully attaching property, a demand addressed to him as an individual without designating him as an officer was held sufficient, especially since no statute required an official designation.¹ So, where one representing plaintiff produced and read to defendant a paper purporting to demand a team in controversy, such was held a sufficient demand even though the paper was ambiguous and at the trial required parol proof as to its meaning.² And where two demands have been made — one verbal and one in writing — but with no reference to each other, evidence at the trial showing the verbal demand alone will be sufficient.³

§ 365. **By Whom Demand Made.** — The demand, as a predicate for trover, must be made either by the owner personally, or by some one duly authorized by him. If the demand be made by attorney, his authority will, generally, be presumed; as where a plaintiff's attorney made demand upon defendant by letter which was received prior to the bringing of the action.⁴ But it has been held that the authority of the attorney will not be presumed where it is made to appear that by agreement of the parties defendant's right of possession was to terminate only upon a written notice to that effect signed by the plaintiff.⁵ Neither will his authority be presumed from the mere fact that he later brought suit for those whom he purported to represent, but did not testify that he was their attorney, or acted in that capacity at the time of making the demand.⁶

§ 366. **Demand by Agent.** — While a plaintiff may make demand by an agent, in those cases where a demand is a prerequisite to an action of trover, yet he must, as a general rule, prove the authority of the agent in the premises,⁷ and the agent must, upon request of the one in possession, exhibit his authority to make the demand.⁸ So, where a demand was made by an agent, and defendant insisted on the agent's producing his authority to act and refusing to deliver the property until he did so, this was held insufficient to render him liable in trover.⁹ This doctrine has been well stated by a Missis-

¹ *Duggan v. Wright*, 157 Mass. 228, 32 N. E. 159.

² *Kendrick v. Beard*, 90 Mich. 589, 51 N. W. 645.

³ *Smith v. Young*, 1 Campb. 439.

⁴ *Lovejoy v. Jones*, 30 N. H. 164.

⁵ *Tingley v. Parshall*, 11 Neb. 443, 9 M. W. 571.

⁶ *Jessee, etc. Piano Co. v. Johnston*, 142 Ala. 419, 37 So. 924.

⁷ *Kendrick v. Beard*, 90 Mich. 589, 51 N. W. 645.

⁸ *Watt v. Potter*, Fed. Cas. No. 17,291.

⁹ *St. John v. O'Connell*, 7 Port. (Ala.) 466.

issippi court as follows: "The general rule certainly is that if the demand is made by an agent, the plaintiff must prove his authority to make it; and otherwise that the refusal will not be evidence of a conversion.¹ But the conduct of the defendant may be a recognition of the authority of the agent and the sufficiency of the demand. It is said by Judge Story: 'If the refusal do not turn upon the supposed want of authority, if the party waives any inquiry into the authority, or admits its sufficiency, and puts his refusal upon another distinct ground, which cannot in point of law be supported, the refusal under such circumstances, is presumptive evidence of a conversion.'² If he claims to detain the property on the ground of ownership in himself, or by arbitrary or unjustifiable means, or under a frivolous or fraudulent pretext without question of the right of the agent making the demand, it is a waiver of all objection to the validity of the demand, and evidence of a conversion, unless the ground on which his refusal is placed is a sufficient justification for the refusal. Thus, if upon demand made the defendant said that he would detain the goods and that he knew a suit would be brought against him, this is evidence of a conversion, sufficient to maintain the action.³ This principle is decisive of the present question. The defendant made no objection to the authority of the agent to make the demand. It appears that the plaintiff was living at the agent's house when the demand was made, and that the defendant was aware of that fact. In reply to the demand, he merely complained of her having quit his house, but refused to give up the articles demanded, except at the end of the law. This conduct was a clear waiver of all objection to the authority of the agent, and placed the defendant on the ground of an arbitrary refusal to deliver the property, which in law amounts to a conversion."⁴

§ 367. **Demand by Other Persons.** — "When a demand is made by an agent, and the party refuses to deliver to the agent, either because he has no authority or declines to produce it, such a refusal, made under such circumstances is not even evidence of a conversion; for every person in possession of property has the right to retain it, until it is demanded by some person having, and if required producing, competent authority to demand it."⁵ Where an officer attaching property left it in the custody of two receptors, and one

¹ 2 Greenleaf, Evidence, 644.

² Citing *Watt v. Potter*, *supra*.

³ Citing *Allen v. Ogden*, 1 Wash. 174; *Ratcliff v. Vance*, 2 Mill Const. 241 (S. C.).

⁴ *Robertson v. Crane*, 27 Miss. 362, 61 A. D. 520; *Buel v. Pumphrey*, 2 Md. 261, 56 A. D. 714.

⁵ *Wall v. Potter*, Fed. Cas. No. 17,291 (2 Mason 78), per Judge Story, cited and quoted in *Dent v. Chiles*, 5 St. & P. (Ala.) 383, 26 A. D. 350.

of these sold it, it was held that the other receiptor could make demand upon the one who sold the property, and such demand was a sufficient predicate for trover.¹ And where the defendant had exchanged a machine with plaintiff's wife for one owned by her husband, a letter written to defendant by plaintiff's wife but in plaintiff's name demanding a return of the machine, was held sufficient.² But a demand by the owner prior to a sale of the property by him has been held not to inure to the benefit of his vendee; in such case, the vendee or some one for him must make demand before suing in trover.³ And where it was shown that a part owner of chattels demanded of his co-owner a settlement, and the latter, without settlement, sold the property and used the proceeds for himself, this was held a sufficient basis for trover.⁴

§ 368. **Upon Whom Demand Made.** — It is the general rule that where a demand is a prerequisite to an action of trover, it must be made upon the one who has the actual control of the property demanded. Thus, the demand may be made upon an agent, if he have the custody of the property, and is charged with the duty of delivering property for his principal, as where demand was made upon a baggage-master for baggage belonging to a passenger.⁵ Or a demand upon a common carrier as being sufficient to hold a shipper liable.⁶ But before the principal can be held liable upon proof of a demand upon his agent, it must appear that the latter had a general or special authority in reference to the goods and that he had been instructed in that behalf by the principal, or that the authority necessarily arises from the nature of the business intrusted to him; and unless one of these facts be made to appear, a demand upon the agent would be futile, could not operate as a demand upon the principal, and would not be evidence of a conversion by him.⁷ But a demand upon a person in charge of a warehouse for property in his possession is valid and binding against the owner, since the nature of the business intrusted to him empowers him to respond to a proper demand for such property; and it is held that his power so to respond rests upon requirements of public policy so that, following the general rules of agency, secret instructions from his principal cannot invalidate his authority.⁸

¹ Carr v. Farley, 12 Me. 328.

² Rice v. Yocum, 155 Pa. 538, 26 Atl. 698.

³ Howell v. Kroose, 4 E. D. Smith, 357; Hall v. Robinson, 2 N. Y. 293.

⁴ Gaw v. Bingham (Tex. Civ. App.), 107 S. W. 931.

⁵ Cass v. N. Y. Cent. etc. Ry. Co., 1 E. D. Smith, 522.

⁶ Wooster v. Sherwood, 25 N. Y. 278.

⁷ Gray v. Gilliam, 15 Ill. 453; Amberg v. Philbrick, 33 Ill. App. 200.

⁸ Seymour v. Cargill Elev. Co., 6 N. D. 444, 71 N. W. 132; Jackson v. Sevaton, 79 Minn. 275, 82 N. W. 634; see Ward v. Moffatt, 38 Mo. App. 395.

§ 369. **Demand upon Partner.** — Where property is wrongfully withheld by a firm, it is the general rule that a demand upon one of the partners is sufficient to bind all. But after a dissolution of the partnership, a demand upon one of the former partners will not be sufficient to bind the other in trover for the conversion of property intrusted to the firm.¹ Where two persons were jointly in control of plaintiff's chattels, and demand for possession was made against one, this was held a sufficient predicate for an action of trover against both.² But the rule is reversed if it appear that defendants are merely joint bailees, and here demand upon each must be shown.³ In a suit for the conversion of certain notes, where it appeared that a corporation and four individuals were joined as defendants, a joint answer was filed in which possession of the notes was admitted, but a conversion of them denied. The defendants pleaded that demand had never been made upon them. The evidence disclosed that the four individuals were brothers and owned the stock in the corporation, and that demand for the notes had been made upon the corporation prior to suit. The court upheld a verdict for the plaintiff, upon the ground that it was unnecessary for plaintiff to show a demand upon each of the defendants.⁴ But where the question presented was the failure of a corporation to issue certificates of stock to one entitled thereto, it was held necessary that plaintiff should show that a previous demand had been made upon the officer authorized to act upon this particular matter.⁵

§ 370. **How Demand Made.** — There is no special form required to be used by an owner of chattels in demanding possession from one who is wrongfully holding them. It is sufficient that the holder be informed that the owner desires to take his property. This information may be imparted either orally or in writing, or it may be sufficient where it may reasonably be inferred from the conduct of the owner. Thus, it is said that a man acquires rightful possession of chattels if they are upon land at the time he recovers it in ejectment, and trover will not lie for their conversion until after demand and refusal to allow plaintiff to take them away; there need, however, be no formal demand in such a case, for if the owner attempts to remove his property, and is not suffered to do so, his attempt is equivalent to a demand.⁶ But in whatever form the demand may be, it must

¹ *Pattee v. Gilmore*, 18 N. H. 460, 45 A. D. 385; *Sturges v. Keith*, 51 Ill. 451.

² *Ball v. Larkin*, 3 E. D. Smith, 555.

³ *Mitchell v. Williams*, 4 Hill (N. Y.) 13.

⁴ *Garbutt Lumber Co. v. Prescott*, 134 Ga. 382, 67 S. E. 1127.

⁵ *Teeple v. Hawkeye Dredge Co.*, 137 Ia. 206, 114 N. W. 906.

⁶ *Cooley, Torts*, 531, citing *Badger v. Batavia Paper Co.*, 70 Ill. 302.

be shown that it brought to defendant actual notice that plaintiff was seeking a return of his property. Thus, where a demand was left at the house of defendant, it was held insufficient unless left under such circumstances as to raise a presumption that defendant thereby acquired actual notice.¹

§ 371. **Demand by Letter.** — And it is held that a demand by letter is insufficient as a predicate for trover because the letter, by inference, requires the holder of the chattels to transport them to the writer — a duty which the law does not impose upon him. “In reason this would seem to be sound doctrine, because it is universally held that a demandant may not require the party in possession — without wrong in the first instance — to perform any other act than that of making manual delivery when called upon for that purpose. A demand which requires the person upon whom made to transport or carry the thing which is the subject of the demand, to the demandant is not sufficient.”² But, while a demand by letter upon another is not sufficient to constitute a conversion if no notice is taken of it, yet if an answer is sent falsely denying the possession of such goods, the demand becomes sufficient to charge the latter with a conversion. “The demand by letter would of itself be insufficient. It would impose no greater duty on defendants than existed before. The fact that a party has in his possession goods deliverable on demand, implies that there is some one to whom the goods are to be delivered. Upon the reception of the letter, the defendant was not bound to transmit the goods to the plaintiff, and if he had taken no notice of the letter, no liability would have been imposed on him. But he denied having any shingles, and that denial dispensed with the necessity of making another demand, for after this it would have been useless to make a demand at any place. The demand made was, therefore, under the circumstances enough to charge him with the conversion.”³ But to constitute a valid demand, it is not essential that the demandant have at the time the means to carry the property away himself.⁴

§ 372. **Time and Place of Demand.** — The time of demand as a predicate of trover is immaterial except that it must be made after plaintiff became entitled to the possession of the property involved, and prior to the commencement of his action against the defendant.⁵

¹ *White v. Demary*, 2 N. H. 546.

² *Teepie v. Hawkeye Dredge Co.*, 137 Ia. 206, 114 N. W. 906.

³ *Pattee v. Gilmore et al.*, 18 N. H. 460, 45 A. D. 385.

⁴ *Edmundson v. Bric*, 136 Mass. 189.

⁵ *Finch v. Clarke*, 61 N. C. 335; *Hagar v. Randall*, 62 Me. 439; *Poppers v. Peterson*, 33 Ill. App. 384.

A demand and refusal given after an action of trover is brought, while insufficient in itself, may be given to the jury as evidence from which to find a prior conversion.¹

§ 373. **Same Subject.** — It is not essential that the demand be made at the place where the property is to be delivered.² Thus, in a case where demand had been made at a place different from that where the chattels were to be received, and the defendant had made no reply to the demand, the court said: "The only question before the court relates to the sufficiency of the plaintiff's demand. The cases which determine the place of delivery have no relevancy to the place of demand; for the demand need not, of necessity, be made at the place where the goods and chattels must be received. If the defendants had declared that the articles were destroyed, or if they had refused to deliver them, no one would doubt that the demand was sufficient. The defendant having engaged to deliver the property in question on demand, it is the legal construction of the contract that a reasonable demand must be made; and any facts which show the demand to have been reasonable, must prove, necessarily, that it was made at the proper place. The only difficulty in the case has arisen from confounding the place of delivery with that of demand; but these are not, of course, co-incident. Had the defendants said: 'We will not deliver the goods,' their contract would have been broken, because a reasonable request for their delivery had been made. I consider the defendants as having been subjected to the obligation of speaking, by the demand of the officer, and that their silence was equivalent to a refusal of the delivery of the goods."³ And in another case where it appeared that the plaintiff, a constable, had seized two law books for the payment of a fine against the defendant, had left them in defendant's possession upon the latter's promise to surrender them upon demand, and, when demand was made, defendant remained silent, neither delivering nor refusing to deliver the books, the court said: "The proof leaves it somewhat uncertain where and when the books were to be delivered. But assuming that they were to be delivered at defendant's office in Farmersville on demand, it was not indispensable to a right of action that the demand should be made at that place. Property may be demanded of a bailee wherever he may be at the time, although he is not bound to deliver at that place. And then if the bailee answer

¹ *Storm v. Livingston*, 6 Johns. 44; *Robinson v. Burleigh*, 5 N. H. 225; see, generally, *Hudson v. Goff*, 77 Ga. 281, 3 S. E. 152; *Butts v. Burnett*, 6 Abb. Pr. N. S. 302; *Young v. Lewis*, 9 Tex. 73.

² *Clark v. Hale*, 34 Conn. 398.

³ *Higgins v. Emmons*, 5 Conn. 76, 13 A. D. 41; *Clark v. Hale*, 34 Conn. 398.

that he is ready to deliver at the proper place there will be no breach of duty. But if he deny the right of the bailor, and refuse to deliver the property at all, there could be no use of making another demand, and the bailee will be answerable in the proper action.¹ Now here, although the demand was made at Ovid, if the defendant's answer was that he would not give up the books, that was a full denial of the plaintiff's right, and no further demand could be necessary. If the answer was that he had not got the books, that would make a more doubtful case. But as the defendant did not intimate that he had lost the books, or that anything had happened to discharge his obligation as a bailee, the answer involved a denial of the bailment and amounted to refusal to deliver the property. At least, the answer may have been so understood by the jury. A bailee is not at liberty to be silent when a reasonable demand is made, though not at the place for delivery."² From such cases is deduced the rule that even though the property is at a distance from the place where demand is made, a refusal by the defendant to surrender it is evidence of a conversion; although it is said in case of a demand at such place, if the defendant merely neglected to give the goods up he cannot be held for their conversion.³

5. EFFECT OF DEMAND AND REFUSAL

§ 374. **When Evidence of a Conversion.** — In treating of the effect of a demand and refusal of possession of personalty, the authorities say that the refusal following a proper demand is a "conversion", or is "evidence of a conversion", in some instances apparently using the terms indiscriminately as amounting to the same thing. The real principle is that in all cases such demand and refusal are evidence of a conversion, but the degree of proof therefrom varies with the circumstances under which the refusal is given. Thus, an absolute, unconditional and unqualified refusal to deliver property to a demandant entitled thereto is not only evidence of a conversion, but the evidence is conclusive, and the refusal is *per se* a conversion.⁴ In discussing this principle, the court, in a case where demand had

¹ Citing, *id. al.*, Scott v. Crane, 1 Conn. 255; Slingerland v. Morse, 8 Johns. 474; Mason v. Briggs, 16 Mass. 453.

² Dunlap v. Hunting, 2 Denio 643, 43 A. D. 763.

³ Bowman v. Eaton, 24 Barb. 528; Whitney v. Slanson, 30 Barb. 276; Gottlieb v. Drummond, 3 Col. 374.

⁴ Pullen v. Bell, 40 Me. 314; Davis v. Taylor, 41 Ill. 405; Hinckley v. Baxter, 13 Allen (Mass.) 139; Nelson v. King, 25 Tex. 655; O'Donoghue v. Corby, 22 Mo. 394; Overstreet v. Nunn, 36 Ala. 649; Stearns v. Houghton, 38 Vt. 583; Miller v. Grove, 18 Md. 242; Boothe v. Estes, 16 Ark. 104; Chase v. Blaisdell, 4 Minn. 90; Ferguson v. Clifford, 37 N. H. 86.

been made upon an officer who had wrongfully attached the goods in question, said: "The court below told the jury that if upon demand there was an unqualified refusal to deliver the property, without requiring any evidence of plaintiff's title, or expressing any doubts about the same, they might presume a waiver of his claim to such information; and we concur entirely in this opinion. The defendant was an officer, whose situation is frequently one of much difficulty, from the conflicting claims by which he is surrounded; and he is entitled to a liberal construction of his acts. But he must act fairly and reasonably. If property which came rightfully into his hands is demanded by a stranger, he will be protected in requiring reasonable information as to the rights of the person making demand if he has any reasonable doubt upon the subject; and should be protected in any reasonable delay necessary to procure information. But when he asks for no delay; when he does not profess to have any doubt; but gives an unqualified refusal; he assumes upon himself the responsibility of deciding, and without inquiry, and without hesitation, that his rights are superior to the plaintiff's.

"From a very early period it has been holden that it is good evidence, *prima facie*, to prove a conversion, that the plaintiff required the defendant to deliver the goods, and he refused; and thereupon it shall be presumed he converted them to his own use.¹ And Holt, C. J. went so far as to say that the very denial of goods to him who has a right to demand them, is an actual conversion.² The true principle, however, is given in *Isaack v. Clark*, 2 Bulst. 314, where the court all agreed that, *prima facie*, a denial when demanded is good evidence to a jury of a conversion; but if the contrary be shown, then the same is no conversion. This principle is recognized by Judge Story in *Watt v. Potter*, where a question was made as to the authority of the persons making the demand. The learned judge, admitting that such persons must have authority, adds, but if the refusal does not turn upon the supposed want of authority — if the party waives any inquiry into the authority, or admits its sufficiency, and puts his refusal upon another distinct ground, which cannot, in point of law, be supported — then the refusal, made under such circumstances, is presumptive evidence of a conversion.³ Here, though he did not state his grounds for refusal, yet he made an unqualified refusal. This, then, unexplained, is evidence of a conversion. He does not attempt to explain it; he asks no information,

¹ Citing Chancellor's Case, 10 Co. 56; *Agars v. Lisle*, Hutt. 10.

² *Baldwin v. Cole*, 6 Mod. 212.

³ 2 Mason, 81.

nor any delay that he may inquire; he does not pretend that he does not understand the nature of the plaintiff's claim, or has a lien for which he seeks indemnity, but contents himself with a cool, unqualified refusal. The fair presumption then is, that he relied upon the indemnity of the creditors, or knowing the nature of the plaintiff's claim, he was ready to put them at defiance. Thus, he denied the plaintiff's right and waived any claim in support of it."¹

§ 375. **Where Refusal Unqualified.** — A person upon whom a demand is made cannot make an unqualified refusal to surrender possession and then at the trial show some matter of justification of his refusal other than a superior right of possession in himself.² And, in order to constitute an absolute and unqualified refusal, it is not necessary that defendant should have said in so many words, that he would not give up the property; it is sufficient if what he says or what he does amounts to this. Thus, a sufficient refusal will be shown by an evasion or delay on the part of the defendant from which it appears that defendant has no intention of complying with the demand.³ And where defendant had purchased goods from one who had no right to sell, and upon demand therefor the owner stated that he would not give them up at the present since he supposed that his vendor had a right to sell them, and for several days after the demand held the goods, it was held that his refusal, in connection with his failure to deliver the property in a reasonable time was sufficient evidence of a conversion.⁴ Where it appeared that defendants had come into possession of stolen property, though not being parties to the original taking, it was held that a refusal by them to return the property upon being apprised of the facts and possession being demanded by the owner, was sufficient evidence of a conversion.⁵ In one case, the rule has been succinctly stated thus: "The moment the owner comes and demands possession of the property, and it is denied him, it is a conversion. This is true in all cases where there is an unqualified denial."⁶ Such unqualified refusal appeared where the defendant had stated in response to a demand that he would not "deliver the goods to any person whatsoever."⁷

§ 376. **Refusal is Denial of Owner's Rights.** — The theory of the decisions in holding that a refusal to honor a demand for possession,

¹ *Thompson v. Rose*, 16 Conn. 71, 41 A. D. 121. See *Folsom v. Manchester*, 11 Cush. 337; *Clark v. Hale*, 34 Conn. 401.

² *Spence v. Mitchell*, 9 Ala. 744; *Ingalls v. Bulkley*, 15 Ill. 224.

³ *Ingersoll v. Barnes*, 47 Mich. 104, 10 N. W. 127.

⁴ *Sargent v. Gile*, 8 N. H. 325; *Kyle v. Hoyle*, 6 Mo. 526.

⁵ *Rector v. Thompson*, 26 Wash. 400, 67 Pac. 86.

⁶ *Doty v. Hawkins*, 6 N. H. 247, 25 A. D. 459.

⁷ *Buel v. Pumphrey*, 2 Md. 261, 56 A. D. 714.

to be evidence of a conversion, is that it amounts to a denial of plaintiff's rights.¹ So, where, in response to a demand by the plaintiff, defendant's attorney had written a letter claiming the defendant to be the owner of the property and repudiating plaintiff's rights therein, this was held sufficient evidence of a conversion.² And the same was held where defendant denied having possession of the articles, but stated that if it did have possession it would refuse to deliver them;³ likewise, where a bailee refused to deliver the property under the claim that it had been sold for storage, but did offer to return it upon payment by the owner of a specified sum;⁴ and similarly where demandant had required the return of more property than the defendant held, but the latter refused to return any;⁵ and where defendant claimed that the goods belonged to a third person;⁶ refused to surrender them under a claim of storage charges, when he had already sold the goods and had the proceeds in his possession which amounted to more than the charges;⁷ stated that he had obtained a loan on the property which was contrary to the terms of the bailment;⁸ requested time to consider and give an answer, but failed for an unreasonable time to reply.⁹ The rule herein discussed is stated thus in Cyc.:¹⁰ "Non-delivery of a chattel, without legal excuse, after demand therefor made by the owner, or his duly authorized agent, on him who has it in his possession or under his control, constitutes a conversion.¹¹ A refusal to deliver a chattel to the owner on proper demand therefor is not a conversion, but only evidence *prima facie* and usually sufficient in the first instance. However, proof of a refusal to deliver the chattel to the owner upon proper demand for the same becomes conclusive if not rebutted or explained."¹²

¹ Phillips v. Shackford, 21 R. I. 422, 44 Atl. 306; Race v. Chandler, 15 Ill. App. 532.

² Carper v. Risdon, 19 Col. App. 530, 76 Pac. 744.

³ Lorain Steel Co. v. Norfolk, etc. Ry. Co., 187 Mass. 500, 73 N. E. 646.

⁴ Briggs v. Hancock, 63 Cal. 343.

⁵ Marine Bank v. Fiske, 71 N. Y. 353.

⁶ Coffin v. Anderson, 4 Blackf. (Ind.) 393.

⁷ Henney Buggy Co. v. Higham, 7 N. D. 45, 72 N. W. 911.

⁸ Nanman v. Caldwell, 32 N. Y. Super. Ct. 212.

⁹ Ryerson v. Ryerson, 8 N. Y. Supp. 738.

¹⁰ Vol. 38, pages 2031 and 2032.

¹¹ Citing, *id. al.*: Chambless v. Livingston, 123 Ga. 257, 51 S. E. 314; Brown v. Noel, 21 Ky. L. Rep. 648, 52 S. W. 849; Donlin v. McQuade, 61 Mich. 275, 28 N. W. 114; Boxell v. Robinson, 82 Minn. 26, 84 N. W. 635; Foster Woolen Co. v. Wallman, 87 Mo. App. 658; Wykoff v. Stevenson, 46 N. J. L. 326; Okla. City v. Rich. Lumber Co., 3 Okla. 5, 39 Pac. 386; Alvord v. Davenport, 43 Vt. 30.

¹² Citing: Ashton v. Heydenfeldt, 124 Cal. 14, 56 Pac. 624; Rosenbaum v. Dawes, 77 Ill. App. 295; Felchen v. McMillan, 103 Mich. 494, 61 N. W. 791; Newman v. Mercantile Co., 189 Mo. 423, 88 S. W. 6; Hett v. Boston Ry. Co., 69 N. H. 139, 44 Atl. 910; McDaniel v. Nethercutt, 53 N. C. 97; Lauder v. Bechtel, 55 Wis. 593, 13 N. W. 483; Ray v. Light, 34 Ark. 421; Sprague Col. Agency v. King, 14 R. I. 511; De Clark v. Bell, 10 Wyo. 1, 65 Pac. 852; Hickox v. Anderson, 19 Fla. 615; Dietus v. Fuss, 8 Md. 148; Garvin v. Luttrell, 10 Humph. (Tenn.) 16.

§ 377. **When Refusal Insufficient as a Conversion.** — The following statement is by Judge Freeman in his note to the case of *Bolling v. Kirby*, 24 A. S. R. 806: "It will be observed that where the intention of the defendant can be successfully urged to exonerate him from a charge of conversion otherwise sustainable, it is not his intention to do no wrong, nor his ignorance that he is doing wrong, which relieves him from liability, but his absence of any intention to use, claim or dispose of the property, either as his or as the property of some person for whom he is acting — his freedom from any act inconsistent with or in defiance of the rights of the owner of the property. Hence, where a demand for the possession of chattels and a refusal to deliver them are relied upon as evidence of a conversion, the defendant may avoid their effect by showing that his refusal was not in assertion of a claim of right on his part, nor inconsistent with the rights of the owner. Thus, if a person in possession of property has a reasonable doubt of the right of the party making a demand upon him for such possession, and disclaiming all right on his part, declines to surrender possession until he can ascertain whether he should do so or not, he is guilty of no conversion."¹ The rule has been elsewhere stated to be that generally if a person merely has property in his possession, but has never claimed title thereto or converted it, or asserted any claim therein inconsistent with the rights of the owner, but upon demand being made by one as to whose claim he knows nothing, merely hesitates, regarding the title as doubtful, he cannot for that be held chargeable with a conversion of the property.²

§ 378. **Same Subject; Refusal Qualified.** — Again, it is said that while the law is that a demand and refusal are generally *prima facie* evidence of a conversion, a qualified, reasonable and justifiable refusal is not evidence of a conversion. It takes a wrongful refusal to constitute the defendant a tort-feasor, and in the absence of such evidence there can be no conversion. It is well settled that the possessor of goods may refuse to deliver them unless the claimant makes some proper and reasonable show of ownership which necessarily includes evidence of identification.³ But if the person upon whom demand is made doubts the authority or right of demandant to claim the property, he must base his refusal to deliver upon that specific ground, or otherwise his refusal will be sufficient evidence of

¹ Citing: *Zachary v. Pace*, 9 Ark. 212, 47 A. D. 744; *Fletcher v. Fletcher*, 7 N. H. 452, 28 A. D. 359.

² 6 *Wait's Actions & Defenses*, 213, citing *Yale v. Saunders*, 16 Vt. 243; *Robinson v. Burleigh*, 5 N. H. 225.

³ *Butler v. Jones*, 80 Ala. 436.

a conversion and he cannot question the authority of the demandant upon the trial.¹ This is upon the principle of waiver, that he who, having the opportunity to insist upon a right, fails to do so, will be deemed in law to have elected not to avail himself of such right.

§ 379. **Illustrations of Same Subject.** — The principle here under discussion received a clear exemplification in a case in which decedent had given to an infant a horse, but left to the defendant the remainder of his personal property among which was the horse at the time of testator's death. The plaintiff, as guardian of the infant, demanded of defendant possession of the horse, and her reply was that the horse was in the possession of the executor, but she didn't know that she would surrender it at any rate. Referring to the demand, the court said: "The general rule is, that any person who is in the possession of another's property is bound to surrender it upon demand. The exceptions are, where a person really and *bona fide* does not know that the applicant is the owner. By which I do not mean that he cannot judge whether his title is good or bad, as it were, upon the law or intricate facts of the case; as if a man finds property, before the finder can be put in the wrong, there must be some grounds to believe that the applicant is the owner; not full proof, but something that would satisfy a reasonable man. Or, if one neighbor bails property to another, if it is demanded of the bailee, and he, thinking it is the bailor's, requests a delay until he can see the bailor and return it to him, this will not be evidence of a conversion. All these exceptions are founded in good sense, and it must appear on the transaction that the bailee neither claims possession for himself, nor even for his bailor, but only that he wished a delay to enable him to return it to the bailor, that the latter might exercise his free will, and not condemn the bailee for not doing so, and that the bailee might thus avoid a law-suit. If this defendant held for the executor, it appears her motives were different from these. I rather suppose she considered that he held title for her, and that she held possession for herself; that she was mistress and could direct and act as she pleased; for it seems that when matters came to an extremity, she would follow her own and not his will. When one is in possession under a bailment, by holding for the bailor, and refusing to deliver the things bailed upon demand, he identifies his possession with the title of the bailor; and if that is bad the possession is a conversion, and he becomes personally chargeable. . . . As to a demand made by a person who does not show that he was guardian, or authorized to make it,

¹ *Ingalls v. Bulkley*, 15 Ill. 224; *Carey v. Bright*, 58 Pa. St. 70; *Smith v. Hartog*, 51 N. Y. S. 257, 23 Misc. R. 353.

I perfectly concur with the counsel, that defendant might well refuse to deliver up the horse on such a demand; but this should have been done on that ground, and not on the claim of right, on her part; it is the claim of right which gives to her possession an adverse character."¹

§ 380. **In Case of Lost Property.** — It is the everyday's practice, when goods have been found, for the finder to give notice by public advertisement, calling on the owner to come forward and prove his property; and if, in such case, the finder only requires an ordinary showing to create a presumption in favor of the claimant, and refuses, if this is not done, such qualification of a refusal would surely be proper testimony to go to a jury, to rebut any implication of a conversion arising from the refusal; and whether the excuse given for failure to deliver was a reasonable one or not, the jury would determine. If the qualification of the refusal were an unreasonable one, a mere pretext or evasion, it would be treated as an unqualified refusal and subject the defendant to the full influence of the implication of law resulting from such refusal.² Thus, if goods have been delivered to one as agent of another, he could, without rendering himself guilty of a conversion, refuse to deliver them to a demandant other than his principal till such time as he could have an opportunity to consult with the latter; but if, after such consultation, he still refused to surrender possession, claiming title in his principal, his refusal would be a conversion unless, in fact, the rights of his principal were superior to those of the demandant.³

§ 381. **Refusal by One Unable to Comply with Demand.** — The refusal to deliver property on demand is never held to constitute a conversion if the one on whom demand is made is unable to surrender it, as where, without his consent, it has been previously lost, stolen or taken from his possession.⁴ Thus, where demand was made upon an agent, but it appeared that at the time of the demand the agent had not the power to comply, it was held that his refusal was not a conversion.⁵ And it was said in another case: "Nor would

¹ *Dowd v. Wadsworth*, 13 N. C. 130, 18 A. D. 567. See *Johnson v. Lindstrom*, 114 Ind. 152, 16 N. E. 400; *Huxley v. Hartzell*, 44 Mo. 370; *Carroll v. Mix*, 51 Barb. 212; *Roberts v. Yarboro*, 41 Tex. 449.

² *Dent v. Chiles*, 5 Stew. & P. 383, 26 A. D. 350; see *McEntee v. Steamboat Co.*, 45 N. Y. 34, 6 A. R. 28; *Sutton v. Great Nor. Ry. Co.*, 99 Minn. 376, 109 N. W. 815; *Williams v. Smith*, 153 Pa. St. 462, 25 Atl. 1122; *Spence v. Mitchell*, 9 Ala. 744.

³ *Ward v. Moffatt*, 38 Mo. App. 395; *Buffington v. Clark*, 15 R. I. 437, 8 Atl. 247; *Singer Mfg. Co. v. King*, 14 R. I. 511; *Mills v. Britton*, 64 Conn. 4, 29 Atl. 231; *Wood v. Pierson*, 45 Mich. 313, 7 N. W. 888; *Ryers v. Weir*, 34 N. Y. 463; *Hartford Ice Co. v. Greenwoods Co.*, 61 Conn. 166, 23 Atl. 91, 29 A. S. R. 189.

⁴ *Frome v. Dennis*, 45 N. J. L. 515; *McDonald v. McKimmon*, 104 Mich. 428, 62 N. W. 560; *Hill v. Belasco*, 17 Ill. App. 194; *Johnson v. Strader*, 3 Mo. 359.

⁵ *Smith v. Colby*, 67 Me. 169; *Abraham v. Nunn*, 42 Ala. 51.

the plaintiff be aided by the demand and refusal, for it was made after the defendant, upon the assumption of a *bona fide* sale, had legally parted with the property, and when he had no power to comply with the demand. A demand and refusal merely are no evidence of a conversion. They do not constitute a conversion, if the party had not the power of compliance.”¹ It has been held, however, that if the defendant fraudulently disposed of the goods, or for the purpose of evading a demand by the owner, sold them or otherwise parted with possession, he will be held liable for a conversion.² In such case, however, it occurs to me that the conversion consists more in the previous disposition of the chattels than in the refusal to honor the demand, and that, in fact, the demand was unnecessary.

§ 382. **Who Chargeable by Refusal.** — It has already been stated in this chapter that a demand by a stranger upon an agent for goods intrusted to the latter by his principal and a refusal by the agent is not evidence sufficient to sustain trover against the principal for a conversion of the goods, unless the agent’s refusal was based upon instructions from his principal to act concerning the demand, or from the general nature of the business intrusted to him public policy would confer upon him the authority to so act.³ But there are circumstances under which one will be considered agent of another when demand is made for the delivery of property in which both are interested, and the demand will be binding upon either or both. Thus, a conversion committed by one partner, of property which has been delivered to him for purposes connected with the business of the partnership, is deemed to be the act of the firm, unless repudiated by the other partners. So, where demand was made upon one member of a firm for the return of chattels and a refusal by him followed, his partner was held liable though absent at the time of demand and refusal.⁴ The court, in the case cited, used this language: “It is conceded that both would have been answerable here for the act of Nisbet, in an action on the contract to redeliver the notes after the purposes of the deposit were satisfied; and this concession includes the decisive fact, that the refusal of Nisbet was the refusal of his co-partner. Being so for any purpose, it must be so for every purpose; for it is not easy to see why it should be his act to charge him on a contract, and not his act to charge him with a tort. It is not doubted that partners may be sued in trover where they join in the

¹ Carr v. Clough, 26 N. H. 280, 59 A. D. 351, citing White v. Phelps, 12 N. H. 385; Knapp v. Winchester, 11 Vt. 351.

² Phelps Dodge Co. v. Halsell, 11 Okla. 1, 65 Pac. 340.

³ Ante, § 368.

⁴ Nisbet v. Patton, 4 Rawle, 120, 26 A. D. 122.

conversion; and do they not join where the act of one is the act of all? ”¹ But where a demand is made upon one member of a firm after its dissolution, his refusal is not sufficient to constitute a conversion as against the other members.²

¹ To the same effect, see *Holbrook v. Wright*, 24 Wend. 169, 35 A. D. 607.⁶

² *Patte v. Gilmore et al.*, 18 N. H. 460, 45 A. D. 385.

CHAPTER VII

WHO MAY BRING TROVER

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| <p>§ 383. Owner of special interest.</p> <p>§ 384. Joint-owners.</p> <p>§ 385. Same subject; whether all owners must join.</p> <p>§ 386. Rule that one joint-owner may sue alone.</p> <p>§ 387. Principal and agent.</p> <p>§ 388. Principal may sue agent and third persons.</p> <p>§ 389. Whether agent can sue third persons.</p> <p>§ 390. Pledgors and pledgees.</p> <p>§ 391. Pledgor against third persons.</p> <p>§ 392. Pledgee against pledgor.</p> <p>§ 393. Pledgee against third persons.</p> <p>§ 394. Bailors and bailees.</p> <p>§ 395. Bailee against bailor.</p> <p>§ 396. Bailor against third persons.</p> <p>§ 397. Mortgagor or mortgagee.</p> <p>§ 398. When mortgagee may sue.</p> <p>§ 399. Holders of commercial paper.</p> <p>§ 400. Same subject; whether possession necessary.</p> <p>§ 401. Lien-holders in general.</p> <p>§ 402. Vendors having liens.</p> <p>§ 403. Purchaser.</p> <p>§ 404. Officers; under attachments.</p> <p>§ 405. Same subject.</p> <p>§ 406. Same subject.</p> | <p>§ 407. Same subject; action by deputy.</p> <p>§ 408. Officer against another officer.</p> <p>§ 409. Officers acting under executions.</p> <p>§ 410. Illustrations of same subject.</p> <p>§ 411. Officer against receiptor.</p> <p>§ 412. Finder of lost property.</p> <p>§ 413. Same subject.</p> <p>§ 414. Illustrations of same subject.</p> <p>§ 415. Where finder of chattel cannot sue.</p> <p>§ 416. Same subject.</p> <p>§ 417. Owner of lost property.</p> <p>§ 418. Owner of stolen property.</p> <p>§ 419. Owner of chattels wrongfully pledged.</p> <p>§ 420. Illustrations of same subject.</p> <p>§ 421. Same subject.</p> <p>§ 422. Lessors and lessees; lessors.</p> <p>§ 423. Same subject.</p> <p>§ 424. Same subject; actions for fixtures.</p> <p>§ 425. Lessees.</p> <p>§ 426. Same subject; where fixtures involved.</p> <p>§ 427. Executors and administrators.</p> <p>§ 428. Trespasser.</p> <p>§ 429. Miscellaneous instances of right of action.</p> |
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§ 383. **Owner of Special Interest.** — It may be said, as a general rule, that an action of trover may be maintained by the legal owner or person who has the right to the immediate possession, whether he own the property in its entirety, or have a special interest therein; but neither a general owner, nor a person having a special interest only, can sue for a conversion where another has the right of immediate possession. And it will be seen that while there must be the

right to the immediate possession of chattels at the time of their conversion to give a person a right to maintain trover, yet a legal title is not always essential.¹ Thus, where partnership notes had been taken in the name of one partner who subsequently died, it was held that the surviving partner could maintain trover against the decedent's administrator for a wrongful detention of the notes.² And where plaintiff, after beginning his action of trover, sold the property involved, and amended his complaint by suing for the benefit of his vendee, it was held that the sale did not defeat his cause of action.³ So, it has been held that a widow who has for years been in possession of the estate of her deceased husband upon which no administration has been had, has sufficient interest to maintain trover for the conversion of property belonging to the estate.⁴

§ 384. **Joint-owners.** — It is not a matter that can successfully be urged as a defense to an action of trover that the title to property converted was in joint-owners; and in such an action by joint-owners it has been held that plaintiffs are entitled to recover without disclosing the exact interest which each has in the property.⁵ In this connection may be properly treated the right of tenants in common to sue for a conversion of the common property. And where such conversion has occurred, it is proper for all of the co-owners to join as plaintiffs, unless they have voluntarily deprived themselves of the right to the immediate possession of the property. But it has been a somewhat disputed question as to whether less than the whole number of co-tenants could maintain the action. Judge Freeman, in his work on *Co-Tenancy and Partition*,⁶ disposes of the question as follows: "In trover, according to the rules of the common law, all the co-tenants must join, in action against third persons, unless some circumstance appears by force of which the case is excepted from the general rule. Co-tenants are exempted from the operation of this rule whenever something has occurred by reason of which one or more of their number can no longer sustain any action. Thus, if one of them has previously brought an action, and the non-joinder of his companion in interest being waived, the action was tried upon

¹ See, generally, on this subject: *Horn v. Davis*, 155 Pa. St. 57, 25 Atl. 828; *Bartlett v. Hoyt*, 29 N. H. 317; *Morgan v. Ide*, 8 Cush. 420; *Lane v. Rosenberg*, 121 N. Y. 696, 24 N. E. 1099; *Edwards v. Dooley*, 120 N. Y. 540, 24 N. E. 827; *Texas etc. Co. v. Beard*, 68 Tex. 264, 4 S. W. 483; *Weeks v. Hackett*, 104 Me. 264, 71 Atl. 858, 129 A. S. R. 390, 19 L. R. A. (N. S.) 1201.

² *Stearns v. Houghton*, 38 Vt. 583.

³ *McElmurray v. Harris*, 117 Ga. 919, 43 S. E. 987.

⁴ *Brown v. Beason*, 24 Ala. 466; *Hyde v. Stone*, 7 Wend. 354, 22 A. D. 582.

⁵ *Robertson v. Gourley*, 84 Tex. 575, 19 S. W. 1006; *Payne v. Davis*, 2 Phila. 364.

⁶ 349.

the merits and resulted in a judgment for the defendant, here, as the plaintiff, by the principle of *res judicata*, is forever precluded from prosecuting any further proceedings based upon the same alleged conversion, his co-tenants must be permitted to bring suit without joining him.¹ And so where one co-tenant has sued and has, by failure of defendant to object to the non-joinder of the others, recovered judgment, and can therefore maintain no further action for the original conversion, the others may sue without him.² But there are American cases directly in conflict with the general rule of the common law, and which affirm the right of each co-tenant to bring a separate action against a third person who has converted any of the personal property of the co-tenancy.”³

§ 385. **Same Subject; Whether All Owners must Join.** — The rule is laid down in Cyc.⁴ that in an action of trover for the conversion of the common property it is permissive, but not absolutely essential that all of the co-tenants should join as plaintiffs.⁵ It seems to me that the true rule is that all may sue jointly, or that either may sue separately; but in the event of suit by fewer than the whole number, the recovery should be graduated by the extent of the interest of those bringing the suit, leaving the right of action unimpaired as to the remaining owners. It has been said, however, that if one co-tenant be in exclusive possession of the common property, this precludes an action by the other for a conversion.⁶ But this could be true only where the one in possession held same by special agreement with the other under which the latter could not interfere with his possession for a definite time; for, on principle, the possession of one is the possession of all, and even though physical possession of the common property be in one to the exclusion of his co-owner, yet in law he holds such possession for both, and either may predicate an action of trover thereon.

§ 386. **Rule that One Joint-owner may Sue Alone.** — While some cases hold that it is necessary that joint owners should be co-plaintiffs in an action for the conversion of their common property,⁷ others qualify the rule by saying that one may sue separately if he have

¹ Citing *Brizendine v. Frankfort*, 2 B. Mon. 33.

² Citing *Starnes v. Quinn*, 6 Ga. 87.

³ Citing *Shamburg v. Moorehead*, 4 Bewst. 92; *Boobier v. Boobier*, 39 Me. 409; *Howard v. Snelling*, 28 Ga. 473.

⁴ 38 Cyc. 121.

⁵ Citing *Blake v. Milliken*, 14 N. H. 213; *Steele v. McGill*, 172 Pa. St. 100, 33 Atl. 146; *Sullivan v. Sherry*, 111 Wis. 476, 87 N. W. 471, 87 A. S. R. 890; *Welch v. Sackett*, 21 Wis. 243.

⁶ *Cole v. Terry*, 19 N. C. 252.

⁷ *Little v. Harrington*, 71 Mo. 390.

the right of immediate possession himself, or if he has received from the other owner proper authority for so bringing the action.¹ And it is elsewhere said that where several persons are joint owners of a chattel, or have a joint right of possession, they must all be joined as plaintiffs, for its conversion, but if the defendant does not plead the non-joinder in abatement one joint owner may recover to the extent of his interest.² Thus, where an officer levied upon and sold the entire common property, upon an execution against one of the tenants in common, the other was permitted to maintain trover against the officer for his share of the property.³ And where the entire property was sold by a mortgagee under a mortgage covering only the share of one tenant, it was held that trover could be maintained by the other for his interest against the purchaser who took away the entire property with knowledge of the facts.⁴ The circumstances under which one may maintain trover against his cotenant have already been discussed in a previous chapter and it would be only a reiteration to state them here.⁵

§ 387. **Principal and Agent.** — It has been heretofore⁶ seen that, as between a principal and his agent, where the latter acts within the scope of the authority conferred upon him, his acts are the acts of his principal, and, as the principal could not be guilty of converting his own property, neither could his agent while so acting; but where the agent goes beyond the authority conferred upon him and does some act not only contrary to such authority but in derogation of the rights of his principal he is deemed to be acting for himself and thereupon becomes subject to the same liabilities as would be imposed upon a stranger, and if his act amount to a conversion of the property, his principal may maintain trover against him.⁷ If the agent have possession of his principal's property his violation of instructions, as a general rule, terminates his right of possession, and thereupon the right becomes reinvested in the principal who is entitled to bring trover.

§ 388. **Principal may Sue Agent and Third Persons.** — And, ordinarily, the principal is not limited to his right of action against

¹ *Hopper v. McWhorter*, 18 Ala. 229; *Arpin v. Burch*, 68 Wis. 619, 32 N. W. 681.

² 6 *Wait's Actions & Defenses*, 217.

³ *White v. Morton*, 22 Vt. 15.

⁴ *Van Doren v. Baltz*, 11 Hun 239.

⁵ See §§ 203 *et seq.*

⁶ *Ante*, §§ 51 *et seq.*

⁷ See *Wilcox-Rose Co. v. Evans*, 9 Cal. App. 118, 98 Pac. 83; *Warner v. Martin*, 11 How. 209, 13 L. Ed. 667; *Frantz v. Winehill*, 124 La. 680, 50 So. 650; *White v. Wall*, 40 Me. 474; *Columbus Company v. Hurford*, 1 Neb. 146; *Etter v. Bailey*, 8 Pa. St. 442; *Wootiers v. Kauffman*, 73 Tex. 395, 11 S. W. 390; *Ludden v. Buffalo Company*, 22 Ill. App. 415.

the agent, unless the agent was the only participant in the act constituting the conversion. For, unless a governing statute intervenes, one taking part or assisting in the act is equally liable with the agent, and the principal may pursue either in trover. But it must not be understood that the principal may bring trover against every one who deals with an agent in such a manner that the transaction as between the agent and his principal amounts to a conversion; for as to such third person, the principal may have conferred upon the agent such *indicia* of ownership, or such apparent authority to act, as that public policy would prevent, and established principles of law would estop him from saying that the act of the third person in dealing with the agent in the particulars complained of was wrongful. Thus, where an agent was intrusted with money to be loaned in the name of his principal, but, violating these instructions, he loaned it in his own name, this was an act of conversion for which his principal was permitted to maintain trover.¹ But the borrower could not be held guilty of a conversion in the absence of proof that he was made aware of the instructions,² although the lack of knowledge of the limitations of the agent's authority will not always exempt a third party from liability to his principal. In further exemplification of this rule, it is well-established law that where an agent or factor has pledged the property without authority, the principal may maintain trover against either the agent or his pledgee.³ In explanation of this rule, Chancellor Kent has said: "To pledge the goods of the principal is beyond the scope of the factor's power; and every attempt to do it under color of sale is tortious and void. If the person will call for the letters of advice, or make due inquiry as to the source from which the goods came, he can discover (say the cases) that the possessor held the goods as factor and not as vendee; and he is bound to know at his peril the extent of the factor's power."⁴

§ 389. **Whether Agent can Sue Third Persons.** — The question naturally presents itself here, whether an agent has the right or authority to maintain trover against one who converts the property which he holds for his principal. Mr. Mechem says,⁵ the possession by a mere servant of his master's goods is ordinarily deemed to be so

¹ Farrand v. Hurlburt, 7 Minn. 477.

² Kramer v. Wood, 52 S. W. 1113 (Tenn. Ch.).

³ Laussatt v. Lippincott, 6 S. & R. (Pa.) 386, 9 A. D. 440; H. A. Prentice Co. v. Page, 164 Mass. 276, 41 N. E. 279; Louisville Bank v. Boyce, 78 Ky. 42, 39 A. R. 198; Terry v. Bamberger, 44 Conn. 561, 23 Fed. Cas. No. 13,837; Bott v. McCoy, 20 Ala. 578, 56 A. D. 223.

⁴ 2 Kent, Com. 625; see Chase v. Whitmore, 68 Cal. 547, 9 Pac. 942; National Ex. Bank v. Graniteville Co., 79 Ga. 22, 3 S. E. 411; Holton v. Hubbard, 49 La. Ann. 715, 22 So. 338; Halsey v. Bird, 99 Fed. 525, 39 C. C. A. 638.

⁵ Mechem, Agency, 765.

far the possession of the master, as to give the servant no right of action against one who disturbs that possession, but where the party in possession has a special property or interest in them, the rule is different. Thus, an agent who is in possession of his principal's goods, having a special property or interest therein, as in the case of a factor, may maintain an action in his own name against any person who wrongfully injures or converts the goods, though such person were the absolute owner; but as against such owner, or those claiming under him, he can recover only to the extent of his interest. The defendant who has disturbed the agent's possession will not be permitted to set up the right of a third party in defense, unless he can show that he acted under the authority of such third party. Where, however, such an agent is not in possession, he may, if he can show that he is entitled to immediate possession, recover from one who wrongfully denies him the right. As against a mere wrong-doer, he would in this case as in the other, be entitled to recover the full value of the goods; but as against the owner, or one claiming under him, only to the extent of his special property.

§ 390. **Pledgors and Pledgees.** — It may be said that the right of a pledgor to sue in trover for a conversion of the pledged property during the continuance of the pledge is limited to those cases in which the conversion is participated in by the pledgee; for if the act of conversion be the act of a third person, to the exclusion of any wrong on the part of the pledgee, the right of action belongs to the latter, because he is the one in whom is vested the right of immediate possession. But where the conversion results from the wrongful act of the pledgee, the relation between him and the pledgor is altered and he may be held for the conversion at the suit of the latter. By this it is not meant that the pledgor may never sue a third person for a conversion, for numerous instances may arise in which the pledgee and a third person may be jointly liable, or the pledgor may hold the third person alone. So, the pledgor may maintain trover against the pledgee where the latter has abused the property or used it contrary to the terms of the pledge and in such a manner as to imperil it or injure it,¹ or where he has misappropriated it, either by himself or through his agent.² And, the pledgor may sue the pledgee in trover where the latter has without authority transferred or re-pledged the property.³ And if the pledgee sell the property

¹ *Crocker v. Gullifer*, 44 Me. 491, 69 A. D. 118; *Stearns v. Marsh*, 4 Denio 227, 47 A. D. 248.

² *Reynolds v. Witte*, 13 S. C. 5, 36 A. R. 678.

³ *Fay v. Gray*, 124 Mass. 500; *Bryson v. Rayner*, 25 Md. 424, 90 A. D. 69.

without authority or if, having authority to sell, he exercises the authority in an improper manner, the pledgor may elect to treat such conduct as a conversion of the property and maintain trover therefor.¹ The same right accrues to the pledgor where he has discharged the principal debt and the pledgee refuses to return the property on demand,² or merely fails to return it when it appears that he has already disposed of it by sale or otherwise.³ The general rule may be said to be that a pledgee cannot lawfully, in the absence of an agreement therefor, re-pledge the pledged property, for the reason that he holds it for security only, to be returned to the owner upon the fulfillment of the pledge, the pledgor being the general owner of the property; but if the pledgee establish authority, either express or implied (as by a general custom known to the pledgor), to re-pledge property, then he cannot be held liable in trover for such re-pledge.⁴

§ 391. **Pledgor against Third Persons.** — While cases have arisen in which the pledgor has been given a right of action against third parties for a conversion of the pledged property, the general rule is that if the third party has purchased or otherwise obtained possession of the property in good faith, without notice of the rights of the pledgor, and for a valuable consideration, such purchase is not a conversion nor can the pledgor maintain trover against him for any subsequent use or disposition of the property. On the other hand, however, if a third person has taken the property from the pledgee with knowledge of the agreement of pledge, or without paying a consideration, or under a merely colorable sale, he will be liable to the pledgor in trover either alone or jointly with the pledgee.⁵

§ 392. **Pledgee against Pledgor.** — The pledgee of chattels may under certain circumstances maintain trover against the pledgor for a conversion of the pledged property. This is so because the pledgee is entitled to possession, and any wrongful interference with that possession or withholding of it by the pledgor is as much a conversion as if the act were committed by a stranger. And this may occur where the pledgor has regained possession lawfully. Thus, where plaintiff had held a promissory note in pledge, but returned it under an agreement for a special purpose, the pledgor promising to redeliver it to

¹ *Nabring v. Bank of Mobile*, 58 Ala. 204; *Rosenweig v. Frazer*, 82 Ind. 342.

² *Kullman v. Greenebaum*, 92 Cal. 403, 28 Pac. 674, 27 A. S. R. 150; *Flowers v. Sproule*, 2 A. K. Marsh. (Ky.) 54; *McCalla v. Clark*, 55 Ga. 53; *Lawrence v. Maxwell*, 53 N. Y. 19.

³ *Gay v. Moss*, 34 Cal. 125; *Wheeler v. Newbould*, 16 N. Y. 392.

⁴ *Merchants Bank v. State Bank*, 77 U. S. (10 Wall.) 604, 19 L. Ed. 1008; *Skiff v. Stoddard*, 63 Conn. 198, 21 L. R. A. 102.

⁵ See § 50, *ante*, and cases there cited. *Talty v. Freedman's Bank*, 93 U. S. 231; *Gregg v. Columbia Bank*, 72 S. C. 458, 52 S. E. 195, 110 A. S. R. 633; *Usher v. Van Vranken*, 48 N. Y. App. Div. 413, 63 N. Y. Supp. 104.

the pledgee but refusing so to do, this was held a conversion by him for which the pledgee could maintain trover.¹ And from such circumstances is deduced the rule that, while a voluntary parting with possession by the pledgee will lose to him the right which he has acquired in the security, yet if he surrender the article to the pledgor for a special purpose under an agreement for its return to him upon fulfillment of such purpose, he does not lose his interest in the property, and a refusal by the pledgor to redeliver it in accordance with the agreement renders him liable to the pledgee in trover.² And the like liability would attach in case the pledgor regained possession through fraud or without the consent of the pledgee.³

§ 393. **Pledgee against Third Persons.** — The pledgee has a special property or interest in the chattel pledged, entitling him to the possession of it until the obligation secured is satisfied, not only as against the pledgor, but as against all the world — except the true owner in case the pledge has been wrongfully made. He is consequently entitled to maintain any action for the protection of his possession and special interest, not only against the pledgor — if he wrongfully retains possession — but against third persons who interfere with the same without right.⁴ Thus, where a third person, without authority, secured the property and returned it to the pledgor, he was held liable to the pledgee in trover.⁵ And the same liability was imposed upon an officer who took the property under an attachment even though the writ was regular on its face,⁶ it being held that in such a case the officer occupied the same position as the pledgor and is liable in the same respects.⁷ But where the pledgor has regained possession of the chattel and sold it to an innocent purchaser, it is held that the pledgee cannot maintain trover against such purchaser.⁸ In the case last cited, a horse had been pledged to plaintiff who afterward loaned him to the pledgor for a special purpose, and in violation of his agreement to return the horse, the pledgor sold him to defendant, who was ignorant of the pledge. The court held trover would not lie against the purchaser, saying: "By

¹ *Way v. Davidson*, 12 Gray 465, 74 A. D. 604, citing *Story*, Bailments, sec. 229; *Edwards*, Bailments, 227; see *Holmes v. First National Bank*, 126 Mass. 358.

² *Macomber v. Parker*, 14 Pick. 497; *Hutton v. Arnett*, 51 Ill. 198; *Thayer v. Dwight*, 104 Mass. 254; *Cooper v. Ray*, 47 Ill. 53.

³ *Jones v. Hicks*, 52 Miss. 682; *Walcott v. Keith*, 22 N. H. 196.

⁴ *Noles v. Marable*, 50 Ala. 366. See 2 Kent's Com. 585; *Barnes v. Swift*, 11 Ohio Dec. 321.

⁵ *Faulkner v. Santa Barbara Bank*, 130 Cal. 258, 62 Pac. 463.

⁶ *Roeder v. Green Tree Brewery Co.*, 33 Mo. App. 69.

⁷ *Baldwin v. Bradley*, 69 Ill. 32. See *Pomeroy v. Smith*, 17 Pick. 85; *Grabfelder v. Lockett*, (Tex. Civ. App.) 26 S. W. 168.

⁸ *Bodenhammer v. Newsom*, 5 Jones L. (N. C.) 107, 69 A. D. 775.

giving up the possession of the article pawned, the pawnee lost his lien, and it would be a fraud upon an innocent purchaser from the pawnor if the pawnee were permitted to recover the pawn from him."

§ 394. **Bailors and Bailees.** — As every bailee is in lawful possession of the subject of the bailment and may justly be considered, notwithstanding all the nice criticisms to the contrary, as having a special or qualified property in it for the protection of that possession; and as he is responsible to the bailor in a greater or less degree for the custody of it, he, as well as the bailor, may have an action against a third person for an injury to the thing; and he who begins the action has the preference; and a judgment obtained by one of them is a bar to the action of the other.¹ By the common law, in virtue of the bailment, the hirer acquires a special property in the thing during the continuance of the contract and for the purposes expressed or implied by it. Hence, he may maintain an action for any tortious dispossession of it or any injury to it during the existence of his right.² The bailee is entitled to damages commensurate with the value of the property taken or the injury it may have sustained, except in a suit against the general owner, in which case his damages are limited to his special interest. If the suit is brought by a bailee or special property-man against the general owner, then the plaintiff can recover the value of his special property; but if the writ is against a stranger, then he recovers the value of the property and interest according to the general rule, and holds the balance beyond his own interest in trust for the general owner.³ It has been said that the bailee of goods for a term, or for a specific purpose, acquires the right to possession during such term, or until such specific purpose is consummated, and can maintain trover against any person who interferes with his right of possession, and the owner cannot sue a wrong-doer for converting the property so long as the bailment continues.⁴ But I do not agree with this statement that the owner cannot sue a wrong-doer for converting the property as long as the bailment continues, unless, indeed, it be said that the conversion *per se* terminates the bailment. I prefer the statement by Kent, *supra*, that either may bring the action, the first in point of time being preferred.

¹ 2 Kent's Com. (14th ed.) 585.

² Story on Bailments, § 394.

³ *White v. Webb*, 15 Conn. 305, cited in *Little v. Fossett*, 34 Me. 545, 56 A. D. 671; see *Beyer v. Bush*, 50 Ala. 19; *Bird v. Womack*, 69 Ala. 390; *Strong v. Adams*, 30 Vt. 221; *Brown v. Dempsey*, 95 Pa. St. 243; *Booth v. Terrell*, 16 Ga. 20; *Overyby v. McGhee*, 15 Ark. 459; *Moran v. Portland Company*, 35 Me. 55; *Triplett v. Morris*, 18 Tex. Civ. App. 50, 44 S. W. 684; *Root v. Chandler*, 10 Wend. 110; *Bass v. Pierce*, 16 Barb. 595.

⁴ *Billings v. Tucker*, 6 Gray 308; *Harvey v. Epes*, 12 Gratt. 153.

§ 395. **Bailee against Bailor.** — That a bailee may maintain trover against the bailor if the latter wrongfully regain possession of the property before the bailment expires, is well established.¹ And it is equally well established that if the bailee so dispose of the property or deal with it contrary to the terms of the bailment as that it is in fact lost to the owner, or his dominion over it destroyed, the bailor may maintain trover against the bailee for a conversion. Thus, if the bailee received the property for one purpose, but applied it to another, this constitutes a conversion for which the bailor may sue.² The reason is that a bailment arises only from an express or implied contract, and the bailee has a right to the custody or use of the property only so long as he lives up to the terms of the contract; and his violation of such terms ends the contract at the option of the bailor, and he may thereupon have his action of trover. In one case this statement was made: "The law of bailments is as clear and as well settled as anything human can be, that the use of anything hired in any way different from that for which it is hired, makes the person hiring it liable for any injury or loss in such service."³ And if the bailee deliver the article to a stranger contrary to the instructions of the bailor, he may be held in trover by a bailor,⁴ as also he may if he alter or change its nature or destroy its identity in any way. Cooley has this to say upon the subject under discussion: ⁵ "Every bailee is bound in his use of the property to keep within the terms of the bailment. If he hires a horse to go to one place, but goes with it to another, he is guilty of a conversion of the horse from the moment the departure from the journey agreed upon takes place. It is immaterial that the change is not injurious to the interests of the bailor; it is enough that it is not within the contract. Contracts are matters of agreement, and even a more beneficial contract cannot be substituted for another without the mutual assent upon which all agreements must rest."

§ 396. **Bailor against Third Persons.** — Where property in the possession of a bailee has been converted by a third person, the bailor may maintain trover for such conversion. Thus, where chattels originally belonging to plaintiff were taken by defendant at an invalid tax sale, but with knowledge that the chattels belonged to plaintiff, it was held that the facts would sustain trover in favor

¹ *Hickok v. Buck*, 22 Vt. 149.

² *Moseley v. Wilkinson*, 24 Ala. 411; *Graves v. Smith*, 14 Wis. 5; *Lucas v. Trumbull*, 15 Gray 306.

³ *Duncan v. Railway Company*, 2 Rich. (S. C.) 613. See Story on Bailments, § 314.

⁴ *Kowing v. Manly*, 49 N. Y. 192; *Foltz v. Stevens*, 54 Ill. 180.

⁵ *Torts*, 757.

of plaintiff.¹ And where a bailee held possession of plaintiff's oxen under an agreement that he should own them when he paid for them, but before making payment the bailee sold them to defendant's brother, the defendant at the time being present and assisting in making the deal, it was held that defendant was liable in trover to the owner for a conversion of the oxen.² So, in a case where a party to a contract was to use certain fixtures for six months if he remained in business that long, but before the expiration of the time made an assignment, it was held that one who purchased the fixtures from the assignee and refused to deliver them to the owner on demand was liable in trover at the instance of the owner.³ And it has been held that where the conversion is the act of the bailee, as by a sale or lease of the property, the bailor may maintain trover against the vendee or lessee even though they acted in good faith and without notice of the facts.⁴

§ 397. **Mortgagor or Mortgagee.** — Whether a mortgagor can maintain trover for a conversion of the mortgaged property by a stranger to the mortgage depends upon whether in the particular jurisdiction he has the right of immediate possession. If it be shown that he have such right, then he may maintain trover even though the mortgage be in form an absolute conveyance.⁵ Thus a wife was permitted to maintain trover against a sheriff who had wrongfully levied upon her property as that of her husband; and it was held to be no obstacle to her maintaining the action that she had previously joined with her husband in the execution of a chattel mortgage upon the property, since the sheriff did not claim under the mortgage and the right of possession remained in the mortgagors.⁶ And, in general, a mortgagor who is in possession of the mortgaged property at the time of an attachment wrongfully levied upon it, may maintain an action for such wrongful levy, even though it operates as a breach of the mortgage.⁷ So, the mortgagee holding possession may so dispose of the property as to make himself liable to the mortgagor in trover. Thus, if the mortgagee, having possession, sell the goods in a manner other than that provided by the mortgage, or until he has complied with legal requirements, an action

¹ *Boutwell v. Parker*, 124 Ala. 341, 27 So. 309.

² *Fisk v. Ewen*, 46 N. H. 173.

³ *Foster Company v. Wollman*, 87 Mo. App. 658.

⁴ *Crocker v. Gulliver*, 44 Me. 491, 69 A. D. 118; *Herron v. Hughes*, 25 Cal. 555.

⁵ *Stossel v. Van Devanter*, 16 Wash. 9, 47 Pac. 221; *Wells v. Connable*, 138 Mass. 513.

⁶ *Buckley v. Walker*, 68 Wis. 563, 32 N. W. 773.

⁷ *Cobbey, Chattel Mortg.*, 738, citing *Copp v. Williams*, 135 Mass. 401; *Hammer v. Wilsey*, 17 Wend. 91; *Vaughan v. Thompson*, 17 Ill. 78.

of trover by the mortgagor will be sustained against him.¹ And if the mortgagee in a real estate mortgage, after the debt is paid, sells timber cut upon the premises, the mortgagor may maintain trover therefor.²

§ 398. **When Mortgagee may Sue.** — It is the general rule that the mortgagee will be entitled to maintain trover for a conversion of the mortgaged property by proof of his right of possession under a mortgage vesting the legal title in him, although it does not appear that he ever had possession of the property, nor foreclosed the mortgage.³ Thus, where an instrument was executed and delivered as security, giving the grantees power to sell the property on default in payment, it was held that the payees had such an interest in the property that they could maintain trover after default, for a conversion of the property.⁴ But where the defendant had, contrary to the directions of the mortgagee, merely removed mortgaged chattels, at the request of the mortgagor, from one place to another, it was held that the mortgagee could not maintain trover therefor even though the mortgage expressly prohibited a removal.⁵ And the mortgagee may, under certain circumstances, maintain trover against the mortgagor as well as against a third person. For if the mortgagor being left in possession should sell the goods during the existence of the mortgage, he would be liable to the mortgagee in trover. So, where all the necessary steps had been taken to perfect the mortgagee's rights under the mortgage, and the mortgagor assigned the goods and assisted the assignee to clandestinely get them beyond the boundaries of the state, it was held that the mortgagor was liable at the suit of the mortgagee.⁶

§ 399. **Holders of Commercial Paper.** — From what has been stated in this chapter, it is apparent that no person except the legal owner, general or special, or a person who has the right to the immediate possession of the property, can maintain an action for its con-

¹ *Simpson v. Carlton*, 1 Allen (Mass.) 109.

² *Hutchins v. King*, 1 Wall. 53; see *Stephens v. Meriden But. Co.*, 13 N. Y. App. Div. 268, 43 N. Y. Supp. 226.

³ 13 Enc. Evidence 69, citing *Wood v. Weimar*, 104 U. S. 786; *Elmore v. Simon*, 67 Ala. 526; *McClure v. Hill*, 36 Ark. 268; *Dunning v. Fitch*, 66 Ill. 51; *Brookoven v. Esterly*, 12 Kan. 140; *Treat v. Gilmore*, 49 Me. 34; *Wright v. Starks*, 77 Mich. 221, 43 N. W. 868; *Cook v. Carthell*, 11 R. I. 482; *Mathew v. Mathew*, 138 Cal. 334, 71 Pac. 344.

⁴ *Johnson v. Osborn*, 85 Ga. 664, 11 S. E. 841; see *Willis v. Bank*, (Tex. Civ. App.) 30 S. W. 81.

⁵ *Metcalf v. McLaughlin*, 122 Mass. 84.

⁶ *Strickland v. Barrett*, 20 Pick. 415; *Ashmead v. Kellogg*, 23 Conn. 70; see, generally, *Burgin v. Burgin*, 23 N. C. 160; *Smith v. Smalley*, 46 N. Y. Supp. 277; *Bates v. Wilbur*, 10 Wis. 415; *Collier v. Faulk*, 69 Ala. 58; *Farmer et al. v. Bank*, 130 Ia. 469, 107 N. W. 170.

version, and that neither a general nor special owner can sustain the action where the right of possession is in another, whether such right was acquired by contract or by operation of law. In all cases where the right of property is relied on by the plaintiff, he must also establish a right of possession in himself of the particular property sought to be recovered for.¹ But where plaintiff establishes some interest in the property involved, he thereby establishes his right to maintain trover for its conversion. Therefore, it is a general rule that the lawful holder of a note or bond may sue in trover for its conversion, and the fact that he may not have the right to sue upon the instrument in his own name is not sufficient to defeat his action of trover,² it being held in one case that the assignee of a note may bring trover in the name of his assignor where the note has been converted.³ And it does not matter that the holder is not the absolute owner — a qualified ownership being sufficient upon which to predicate trover. For instance, it has heretofore been seen that one holding collateral security consisting of promissory notes or other evidences of indebtedness may maintain an action of trover against another who unlawfully seizes, detains or otherwise converts them. The object of taking this class of collateral as security is to obtain the proceeds thereof either through the voluntary action of the makers, or by compulsory proceedings against them. The holder of collateral may therefore sue thereon with like effect as if he were the absolute owner, and he need not make his pledgor a party to the action nor otherwise take any notice of the pledge. He is at all times entitled to demand and receive the money due upon such securities, and whenever they are not paid when due, to enforce payment by proper action.⁴

§ 400. **Same Subject; whether Possession Necessary.** — Although it has been held that a party entitled to the immediate possession of a note may recover in trover for its conversion even though the note has never been actually delivered to him,⁵ yet in another state it has been said that the owner of a bond or note cannot maintain trover for its conversion unless it has been legally indorsed to him, in effect holding that an equitable interest is not sufficient as a

¹ 6 Wait's Actions & Defenses, 218.

² *Donnell v. Thompson*, 13 Ala. 440; *White v. Bonney*, 110 Va. 864, 68 S. E. 273.

³ *Day v. Whitney*, 1 Pick. 503.

⁴ Note to 32 A. S. R. 726, citing *Rome v. Haines*, 15 Ind. 445, 77 A. D. 101; *Lamberton v. Windom*, 12 Minn. 232, 90 A. D. 301; *Haydon v. Nicoletti*, 18 Nev. 290, 3 Pac. 473; *Houser v. Houser*, 43 Ga. 415; *Kinney v. Kruse*, 28 Wis. 183; see *Hazzard v. Duke*, 64 Ind. 220; *Noland v. Clark*, 10 B. Mon. 239; *Jefferson Bank v. Ohio Falls, etc. Co.*, 20 Fed. 65.

⁵ *Mininger v. Banning*, 7 Minn. 274.

basis of trover.¹ Thus, where plaintiff had possession of a note belonging to another but not indorsed by the latter, and placed it in the hands of the defendant for collection, the defendant having collected the note and converted the proceeds to his own use, it was held that an action of trover could not be maintained by plaintiff since the legal title to the note was in another.²

§ 401. **Lien-holders in General.** — A mere lien, created by contract or implied by law, or the right to subject specific property to the payment of a debt, is not sufficient of itself to support an action of trover at the instance of the lien-claimant; there must be coupled with this the right to the instant possession of the property itself.³ But where a lien is dependent for its validity upon possession in the claimant, any interference by which he is deprived of his possession constitutes a conversion for which he may bring trover; and any means of depriving him of such possession not amounting to a waiver by him of the right to his lien will be sufficient to constitute such wrongful interference.⁴ Thus, where defendant, with knowledge that plaintiff held a lien against a crop for advances to the grower, bought the crop and removed it, it was held that an action of trover could be maintained against him by the plaintiff.⁵ And generally where one has possession of personalty for the purpose of repairing it or doing work upon it, he has a lien for his services, which continues as long as he holds possession or the amount due is paid; and any act on the part of either the owner or a third person by which he is deprived of his possession will be sufficient to support trover in his behalf. And it has been held that an allegation in the complaint in an action of trover that the plaintiff's lien has been lost or impaired by the conversion by the defendant is a proper predicate for trover.⁶ However, it has been otherwise held that if the lien-claimant has not an absolute right of possession he cannot maintain trover against a purchaser from the owner who has done nothing more inconsistent with the rights of the lienor than to refuse to surrender the property to plaintiff.⁷ It has been held in one state that

¹ Killian v. Carroll, 35 N. C. 431.

² Herring v. Tilghman, 35 N. C. 392; but *contra*, see Lowmore v. Berry, 19 Ala. 130, 54 A. D. 183.

³ Street v. Nelson, 80 Ala. 230; Evington v. Smith, 66 Ala. 398; Anderson v. Bowles, 44 Ark. 108; Dekle v. Calhoun, 60 Fla. 56, 53 So. 14; Frink v. Pratt, 26 Ill. App. 222, 130 Ill. 327, 22 N. E. 819.

⁴ Gafford v. Stearns, 51 Ala. 434; 13 Enc. Pl. & Pr. 126; Dekle v. Calhoun, *supra*. See Hahn v. Sleepy Eye Milling Co., 21 S. D. 324, 112 N. W. 843.

⁵ Rew v. Maynes, 147 Ia. 15, 125 N. W. 804. It will be noted that in this case plaintiff had not been in possession prior to the conversion.

⁶ Scarbrough v. Rowan, 125 Ala. 509, 27 So. 919.

⁷ Black v. Elevator Company, 7 N. D. 129, 73 N. W. 90.

while the owner of property which has been converted may have his action at law for the conversion, the lien-claimant cannot so proceed, but must apply in equity to have the proceeds of the sale in discharge of the lien-debt.¹ This may be true where the lien does not depend for its validity upon possession in the claimant, but certainly not if the claimant is entitled to the possession of the property converted; although it has been held that the lien extends not only to the property itself, but also to money recovered by the owner from one who had converted the property.²

§ 402. **Vendors having Liens.** — Vendors frequently resort to an action of trover for the protection of their rights arising from a lien for the unpaid purchase price. And it is the general rule that where goods are sold for cash to be paid for on delivery, the payment and delivery are to be concurrent; and if delivery be made to the buyer with the expectation that he will immediately pay for them which he refuses to do, the seller may maintain trover as for a conversion of the goods.³ “The existence of a vendor’s lien always presupposes that title to the goods has passed to the vendee, since it would be an incongruous conception that a vendor might have a lien on his own goods. It is next to be observed that a vendor’s lien is in no sense a right of rescission. On the contrary, it proceeds in affirmation of the contract, and as a means of its enforcement. It is in the nature of a pledge raised or created by the law, upon the happening of the insolvency of the vendee, to secure the unpaid purchase-price to the vendor. It is a mere right of detention and sale to satisfy the unpaid purchase-money.”⁴ And, “in a sale of chattels, when the specific articles are set apart, or identified for the purpose, and there is no stipulation for credit, the sale, as between the parties, takes effect at once to pass the title to the purchaser, unless there is some agreement to the contrary, and the price is also due at the same time. Until delivery is complete and absolute, the vendor has a lien for the purchase money and may retain possession until payment.”⁵ So, if the delivery is partially completed, and the buyer sells or pledges the goods received to a third person, without notice to the seller, the lien for the purchase price is not affected and the seller may maintain trover against the sub-buyer.⁶ Or, if the property has been set apart for the buyer in such a manner as to constitute a constructive de-

¹ *Judge v. Curtis*, 72 Ark. 132, 78 S. W. 746.

² *Scott v. Farmers' etc. Bank*, 66 S. W. 485, 67 S. W. 343 (Tex. Civ. App.).

³ *Canadian Bank v. McCrea*, 106 Ill. 281.

⁴ *Conrad v. Fisher*, 37 Mo. App. 352.

⁵ *Haskins v. Warren*, 115 Mass. 533.

⁶ *Palmer v. Hand*, 13 Johns. 434, 7 A. D. 392; *Cornwall v. Haight*, 8 Barb. 327.

livery sufficient to pass title, a sub-buyer must take notice of the original seller's lien, and for any interference with the possession he will be answerable in trover.¹ So, if the vendee obtains goods upon credit, but by fraud, and possession is thereupon delivered to him, it is held that title does not pass and the vendor may elect to treat the sale as void and maintain trover against the buyer.²

§ 403. **Purchaser.** — Referring to the right of a purchaser to maintain trover for goods bought by him, Mr. Wait says:³ "The purchaser of goods cannot maintain trover for them against the seller, in whose possession they were left, until he has paid or tendered the price, for, although he acquires the right of property by his purchase, he does not acquire the right of possession until he has paid the price agreed upon, or tendered it to the seller. And this has been held to be the case even where the goods were sold upon credit. By the purchase the vendee only acquires a right of property which does not ripen into property in him until he has paid the price, or the property has been delivered to him in pursuance of the sale. But where the sale is complete, and the articles are *in esse*, and specifically designated, and a credit is agreed upon, unless the vendee has been guilty of fraud in the purchase or procurement of credit it is believed that he may maintain trover against the vendor for a refusal to deliver the goods. But if anything remains to be done, or if the property is not set apart from other property of the same kind, or if the contract is within the statute of frauds, or if the article is to be made, trover will not lie. And, where the property has not been set apart from other property of the same kind, or where it is to be manufactured, it is held that trover will not lie for the property, because the plaintiff's title applies to no specific property, even though the price has been paid. Where the property has been specifically designated, but something remains to be done to it, the question whether title passes before the article is ready for delivery, and consequently whether trover could be maintained by the buyer therefor or not, depends on the *intention* of the parties. . . . Where property has been sold upon credit to be paid for within a certain time, if the vendor sells it before the term expires, the vendee, by tendering the price within the time, can maintain trover for the property. And it is held that if the price is tendered *after* the time had

¹ Arnold v. Delano, 4 Cush. 33, 50 A. D. 754; Perrine v. Barnard, 142 Ind. 448; 41 N. E. 820; see Southwestern Frt. Co. v. Plant, 45 Mo. 517; Southwestern Frt. Co. v. Stanard, 44 Mo. 71, 100 A. D. 255.

² Ayres v. French, 41 Conn. 153; Hall v. Naylor, 18 N. Y. 588; Dow v. Sanborn, 3 Allen (Mass.) 181; Williamson v. Russell, 39 Conn. 406.

³ 6 Wait's Actions & Defenses, 187-8, citing English cases.

expired, but *before* its resale by the vendor, the vendee may maintain trover therefor; but not if the price is not tendered until after he has re-sold the property. . . . Where property sold upon credit has been delivered, and the vendor, without authority, retakes and sells the property, he is liable to the vendee for its conversion.”¹

§ 404. **Officers; under Attachments.** — When an officer levies an attachment on personal property, he becomes liable therefor at the termination of the suit; on the one hand, for its production to satisfy the plaintiff's execution, if obtained; on the other, for its return to the defendant if the suit fails or the attachment be otherwise dissolved. Hence, the first duty of the officer is to retain possession of the property. If he do not, he will be regarded as having abandoned the attachment; and its lien, as to subsequent attachers, or *bona fide* purchasers from the defendant, will be lost.² In view of this liability, it is necessary that the officer should sustain such a relation to personal property which he has seized as will enable him to hold it. To this end he is, by the levy of the attachment and the reduction of the property to his possession, vested with a special interest or property which enables him to protect the rights which he has thus acquired. This special property of the officer continues so long as he remains liable for the attached effects, either to have them forthcoming to satisfy the plaintiff's demand, or to return them to the owner upon the attachment being dissolved; but no longer. For any violation of his possession, while his liability for the property continues, he may maintain trover, trespass or replevin.³

§ 405. **Same Subject.** — The right of action exists in favor of the officer as well where he has bailed the property to another as where he retains actual possession, for, although he have not the actual keeping of the goods, yet the custody of the bailee being that of his servant or agent, and his special property being still in existence, he is regarded as having the lawful possession, so as to enable him to maintain an action for it.⁴ So, where a bailee fails to re-deliver property according to the terms of his contract, the officer may retake it if accessible; but no case has met my observation holding that he is under obligation to do so, except one in Maine where it was held that the plaintiff's approval of the receptor's ability did not exonerate the officer from making effort to find the

¹ *Huelet v. Reyns*, 1 Abb. Pr. n. s. 27.

² *Drake on Attachment*, 290, and cases cited.

³ *Id.*, citing among others: *Collins v. Smith*, 16 Vt. 9; *Gates v. Gates*, 15 Mass. 310; *Holt v. Burbank*, 47 N. H. 164; *Wentworth v. Sawyer*, 76 Me. 434; *Ludden v. Leavitt*, 9 Mass. 104; *Badlam v. Tucker*, 1 Pick. 389; *Lowry v. Walker*, 5 Vt. 181.

⁴ *Drake, Attachment*, 371.

property to respond to execution, or from the duty of bringing a suit on the receipt.¹ His right of action upon the receipt accrues upon his demanding the property from the bailee, and the failure of the latter to deliver it.²

§ 406. **Same Subject.** — An officer's possession of attached property is sufficient as a predicate for an action of trover by him not only against any stranger to the suit who disturbs that possession, but even against defendant in the writ who wrongfully interferes with same. Thus, it is held that the owner of goods who receipts for them as attached is liable to the officer in trover if he refuses to deliver them to the latter on demand, although no actual seizure of the goods under the writ of attachment preceded the writ, where the goods were at the time in the possession of the receptor.³ In the case last cited, the court said: "The case shows that this defendant actually owned, and had upon his farm, five hundred sheep; that the officer went there to make service of the writ; and that, without requiring the ceremony of going to view the sheep, or separating the flock, the defendant, and another person, executed a receipt for three hundred and fifty of the sheep, which the officer returned as being attached under the writ. Now there is no doubt but that the legal requirements of a valid attachment are as the counsel has contended for. It is nothing less than the actual seizure of the property, or having it within the power and control of the officer. But this definition is framed with reference to an attachment in the strict sense of a proceeding *in invitum* — the power of the law operating against the will, or without the concurrence of the party affected by it. As against an unwilling party, or a third person, whose rights are affected, it must, doubtless, conform to this description. It is competent, however, for a party to dispense with forms or ceremonies which he might have insisted on, and still leave the attachment effectual as against himself. . . . And if the principle here advanced be a sound and just one, the present is surely a strong case in illustration of it. The property did exist and was attachable; and but for the voluntary arrangement between the defendant and the officer, it would have been regularly seized and removed. But the defendant chose to have it treated as being attached (waiving the ceremony of actual seizure and removal) and

¹ *Palmer v. Hand*, 13 Johns. 434, 7 A. D. 392; *Cornwall v. Haight*, 8 Barb. 327, citing *Allen v. Doyle*, 33 Me. 420.

² *Id.*, citing *Page v. Thrall*, 11 Vt. 230; *Scott v. Whittemore*, 7 Foster, 309. See, also: *Davis v. Miller*, 1 Vt. 9; *Baker v. Fuller*, 21 Pick. 318; *Smith v. Wadleigh*, 18 Me. 95; *Story, Bailments*, 107; *Bacon v. Thorp*, 27 Conn. 251; *Jameson v. Ware*, 6 Vt. 610; *Gilmore v. McNeil*, 46 Me. 532.

³ *Pettes v. Marsh*, 15 Vt. 454, 40 A. D. 689.

undertook to keep it for the officer, who, with his assent, charged himself with a liability for it. He cannot now say that his subsequent possession of the property was not subservient to the officer's right. It appears that the property was afterwards duly demanded, but having been previously disposed of, was not restored. We think that upon such a state of fact, the action of trover can be maintained."¹

§ 407. **Same Subject; Action by Deputy.** — It has been held, either rightly or wrongly, that a deputy sheriff may maintain an action of trover in his own name for the conversion of goods which he has attached. In a case which has come under my observation, the court, in so holding, said: "The defendant's counsel contend that if any special property was acquired by said attachment, it by law vested in the sheriff, and not in the deputy, and sundry cases have been cited in support of this objection. But in looking into the cases, we do not find them at all decisive, and in the case of *Perley v. Foster*, 9 Mass. 112, a contrary doctrine is laid down as having been sanctioned by the practice and decisions of this court. This is conformable to a well established principle, that he who has had possession in fact of goods and chattels, being answerable to another in whom the general property is, may maintain an action of trover for the conversion of them by a stranger. A deputy sheriff who takes possession of goods attached on mesne process is bound to keep them safely until the attachment is dissolved and he is answerable both to the debtor and creditor, if he suffers them to be taken away or injured. He has, therefore, the right of possession, and this constitutes such a special property as enables him to maintain trespass or trover against any one who may unlawfully intermeddle."² It seems to me that in this case the argument of counsel was more sound than the court's decision. On principle, the parties to an attachment suit do not look to a deputy sheriff for the preservation of the attached property. The sheriff is their reliance, and this being so, and the physical possession by the deputy being the legal possession of the sheriff, an action for the conversion of such property should be brought in the name of the sheriff.

§ 408. **Officer against Another Officer.** — Where two officers, under different writs, assumed possession at practically the same time, each claiming to have made an attachment, and later agreed to a division of the property thereby becoming tenants in common, it was held that when one seized and sold the whole of the goods on

¹ *Sibley v. Story*, 8 Vt. 15.

² *Badlam v. Tucker*, 1 Pick. 389, 11 A. D. 202.

an execution issued in pursuance of his attachment, that the other could thereupon maintain trover against him.¹ And where property in the hands of an officer under an attachment was wrongfully taken from him by replevin, it appearing in the replevin suit that the justice issuing the writ had no jurisdiction, it was held that the officer could maintain trover for the value of the goods.² But where a levy of attachment has been made, an officer levying a second writ during the continuance of the first levy acquires no right to the possession of the property, and therefore cannot maintain trover for its conversion.³ It has been held that proof of a legal seizure of property by virtue of an attachment will support trover although not shown to have been accompanied by actual possession, since in such case the officer is invested with constructive possession;⁴ yet the evidence must show an actual and lawful levy.⁵ This being shown, there then appears a sufficient interest of the officer to enable him to maintain trover,⁶ although such right does not accrue in favor of the plaintiff in the attachment suit.⁷

§ 409. **Officers Acting under Executions.** — The observations made in the preceding sections relative to the rights of an officer in respect of attached property apply with equal force where the goods in question have been seized by the officer by virtue of an execution. The officer is entitled to retain such possession and control of the property as may be necessary to make it productive under the writ. The law, therefore, concedes to him as to a bailee a special property in the goods in his custody. It gives him all the legal remedies needed to maintain his rights, and to secure him indemnity for their invasion. If the property is taken from him, or if, being left by him in the possession of another, it is taken from such possession by any one or is converted by the custodian, the officer may maintain an action of replevin, trespass or trover just as the owner of an absolute title could do in like circumstances.⁸ He may maintain either of these actions against the defendant in the writ, as well as against a stranger to it.⁹

¹ *Lyman v. Dow*, 25 Vt. 405.

² *Clow v. Gilbert*, 54 Ill. App. 134; see *Hatch v. Kenny*, 141 Mass. 171, 5 N. E. 527.

³ *Dubois v. Harcourt*, 20 Wend. 41.

⁴ *Mulheisen v. Lane*, 82 Ill. 117.

⁵ *Brian v. Strait*, *Dudley* (S. C.) 19.

⁶ *Huntley v. Bacon*, 15 Conn. 267; *Gibbs v. Chase*, 10 Mass. 125; *Lathrop v. Blake*, 23 N. H. 46; *Tuttle v. Jackson*, 4 N. J. L. 115; *Blodgett v. Adams*, 24 Vt. 23.

⁷ *Baker v. Beers*, 64 N. H. 102, 6 Atl. 35.

⁸ *Freeman*, *Executions*, 268, citing: *Bean v. Schmidt*, 43 Minn. 505, 46 N. W. 72; *Parker v. Dean*, 45 Miss. 408; *Wright v. Lepper*, 2 Ohio 297; *Dunkin v. McKee*, 23 Ind. 447; *Benson v. Berry*, 55 Barb. 620; *Rogers v. Darnaby*, 4 B. Mon. 241; *Malone v. Abbott*, 3 Humph. 532; *Fellows v. Wadsworth*, 62 N. H. 26.

⁹ *Id.*, citing: *Martin v. Watson*, 8 Wis. 315; *Williams v. Herndon*, 12 B. Mon. 484, 54 A. D. 551; *Weatherby v. Covington*, 3 Strob. 27, 49 A. D. 623.

§ 410. **Illustrations of Same Subject.** — In one of the cases above cited, the court said:¹ “There is no doubt that a levy upon personal property gives to the sheriff such a possession as enables him to maintain trover for its conversion while in its possession. Nor do we doubt that if he has made a proper levy, but permits the property to remain with the defendant in the execution, or any other, on a verbal undertaking to have it forthcoming on the day of sale, his possession continues so as to entitle him to the action against the bailee or any others who may convert it to their own use, and thus prevent him from subjecting it according to law to the satisfaction of the judgment.” “The sheriff by a levy acquires the legal property in the goods. He may maintain an action against the defendant and all other persons. When the executions are satisfied, any goods which may remain in the sheriff’s hands are revested in the defendant, or any other person to whom he may have assigned his right. To one of these, the sheriff is liable for a redelivery of such goods; and to meet that liability must have an action against a wrongful taker.”² And it has been held that a sheriff levying upon and leaving the goods in the hands of the judgment debtor, which are subsequently levied upon and sold by a constable as the property of the judgment debtor, has sufficient title to maintain trover against a purchaser at such constable’s sale without notice of the sheriff’s levy.³ While an officer, subsequent to the issuance of an execution, but prior to a levy by him, has no such interest in the property of the judgment debtor as will enable him to maintain trover against a wrong-doer who converts it to his own use,⁴ yet where the officer, after making a levy under an execution, left the property in the possession of the defendant, it was held that he could maintain trover for its conversion without proving that he took actual possession of the property.⁵

§ 411. **Officer against Receiptor.** — It is well settled that if an officer, after levying upon goods and chattels under an execution, leave them with a receiptor to be redelivered on demand, he may maintain trover against such receiptor if the latter detains the goods after his right thereto has ceased.⁶ And the same right has been held to exist where the receiptor has without right delivered the goods to a third person or permitted the latter to take them.⁷ But

¹ *Williams v. Herndon*, *supra*.

² *Weatherby v. Covington*, *supra*.

³ *Brewster v. Vail*, 1 Spencer (N. J.), 38 A. D. 547; see *Brink v. Decker*, 3 N. J. L. 902; *Barker v. Miller*, 6 Johns. 195; *Mangun v. Hamlet*, 30 N. C. 44; *Douglas v. Mitchell*, 7 N. C. 239.

⁴ *Hotchkiss v. McVickar*, 12 Johns. 403.

⁵ *Weidensaul v. Reynolds*, 49 Pa. St. 73.

⁶ *Dezell v. Odell*, 3 Hill (N. Y.) 215, 38 A. D. 628.

⁷ *Lockwood v. Bull*, 1 Cow. (N. Y.) 322, 13 A. D. 539.

it has been held, apparently in conflict with the principles and decisions above noted, that where a bailiff distrained for rent and left the goods on the premises of the owner who took them away, that the latter could not be held in trover at the suit of the officer.¹ And that where a sheriff took no actual possession of goods subject to duties, but merely a certificate from the public store-keeper that the goods were subject to the officer's order, the latter could not maintain trover for a conversion of them.²

§ 412. **Finder of Lost Property.** — The rights accruing to the finder of personal property which has been lost by the owner constitute an interesting subject in the law of trover, since the action was originally an action of trespass on the case where goods were *found* by the defendant and retained against the plaintiff's rightful claim. And another interesting subject in connection therewith is the determination of what is and what is not lost property; but since a discussion of this question would be beyond the scope of the present work, it is sufficient to say that the authorities, as a general rule, hold that money or other property voluntarily laid down and forgotten is not in legal contemplation lost, and that the owner of the shop, bank or other place where it is left is the proper custodian rather than the person who happens to discover it, as well, also, as to all other persons except the owner.³ But it appearing that the property in question was actually lost and later found by one other than the owner, the finder is entitled to possession against the whole world except the owner,⁴ or those obtaining title directly from or through him.⁵

§ 413. **Same Subject.** — The rule being as announced that the finder of lost property is entitled to its possession as against a stranger, it follows that he may maintain any action for the protection of his right of possession which he could were he the real owner; and, therefore, a person other than the owner or those in privity with him, who deprives the finder of his possession, may be held in trover as for a conversion at the suit of the finder.⁶ Thus, a maid in a hotel found a roll of bank bills in the hotel parlor; the proprietor took the bills, suggesting that they belonged to a guest to whom he would send them; it subsequently developed that the bills did not

¹ *King v. Fearson*, Fed. Ca. No. 7789; but see *Alexander v. Mahon*, 11 Johns. 185.

² *Dennie v. Harris*, 9 Pick. 364.

³ *Hoagland v. Forest Park Co.*, 170 Mo. 335, 70 S. W. 878, 94 A. S. R. 740.

⁴ *Kuykendall v. Fisher*, 61 W. Va. 87, 56 S. E. 48, 8 L. R. A. (N. S.) 94; *Wood v. Pierson*, 45 Mich. 313, 7 N. W. 888; *Williams v. State*, 165 Ind. 472, 2 L. R. A. (N. S.) 248; *Deaderick v. Oulds*, 86 Tenn. 14, 5 S. W. 487; *Lawrence v. Buck*, 62 Me. 275.

⁵ *Chase v. Corcoran*, 106 Mass. 286.

⁶ 2 Kent's Com. 356; *Darlington on Personal Property*, 35-37.

belong to the guest, and thereupon the maid demanded their return to her, which was refused by the proprietor. In an action by her for the money, the court held her entitled to recover.¹ In another case involving the same principle, but not property technically lost, it appeared that a laborer employed to dig and level off a grade on public land for a quartz mill, but which was not within any mineral location, found a pocket of quartz gold while so working, at or close to the edge of the sloping rock left by the excavation; and it was held that such gold, when extracted, belonged to him as the first taker under the laws of the United States, and that he might recover its value from his employers who had wrongfully seized and converted it to their own use.² Likewise, where an employee in a paper factory found certain lost bank bills in a bale of old paper, and delivered them to the proprietor to ascertain if they were genuine, upon his promise to return them, it was held that the employee could maintain trover for their value upon his refusal to return them.³

§ 414. *Illustrations of Same Subject.* — In one of the earliest cases involving the subject under discussion, a chimney-sweeper's boy had found a jewel and carried it to a goldsmith to ascertain what it was. The goldsmith refused to return it, and an action of trover against him was sustained in favor of the boy, it being held that by the finding the latter had acquired such a property in the jewel as would entitle him to keep it as against all persons except the rightful owner.⁴ And the principle announced in this case has been uniformly adhered to.⁵ As further illustrative of this principle, a plaintiff had bought an old safe and soon after delivered it to his agent for sale, the latter having the right to use it in the meantime. The agent found between the inner casing and the lining a number of bank bills belonging to some person unknown. The owner of the safe first demanded the money, and this being refused by the agent, he demanded the safe in the condition it was when received by the agent. The latter delivered the safe, but retained the money, and in an action against him by the owner of the safe, it was held that the agent was entitled to the bank bills.⁶

¹ *Hamaker v. Blanchard*, 90 Pa. St. 377, 35 A. R. 664.

² *Burns v. Clark*, 133 Cal. 634, 66 Pac. 12, 85 A. S. R. 233.

³ *Bowen v. Sullivan*, 62 Ind. 281, 30 A. R. 172.

⁴ *Armory v. Delamirie*, 1 Strange 504, 1 Smith's Leading Cases pt. 1, 475.

⁵ See: *Danielson v. Roberts*, 44 Ore. 108, 74 Pac. 913, 102 A. S. R. 627; *Soveran v. Yoran*, 16 Ore. 269, 20 Pac. 100, 8 A. S. R. 293; 19 Am. & Eng. Enc. L. 2d ed. 579; *Mathews v. Harsell*, 1 E. D. Smith 393; *Brandon v. Planter's etc. Bank*, 1 Sten. (Ala.) 320, 18 A. D. 48.

⁶ *Durfee v. Jones*, 11 R. I. 588, 23 A. R. 528.

§ 415. **Where Finder of Chattel cannot Sue.** — An exception to the rules here outlined exists in cases where the property found is a chose in action. In such case, while perhaps the finder has the right of possession as against all but the owner, no right of action accrues to him thereby. "The law is well settled that the finder of a chattel acquires a right to the chattel found against all the world except the owner. It is also well settled that the finder of a promissory note or chose in action does not acquire such a right as will enable him to maintain an action for the money. The finder is entitled to hold the thing found until the owner appears; but if it is a note or chose in action, it is but evidence of a right, and of no value unless enforced."¹ The reason for this rule, as announced, is that in such cases it is only the written evidence of a right of action which is lost, and even without this the owner may recover against the obligor by proving the loss of the instrument and the existence of the obligation. Of course, if the evidence of indebtedness is one that ordinarily passes as money, the finder would have the same rights thereto as he would have in any other tangible property in the same circumstances.

§ 416. **Same Subject.** — A case involving the same principles was decided by the Iowa court, and is sufficiently interesting to merit attention, because, at least so far as my observation has extended, it is the only case of its kind in the books. There, an aerolite had "fallen from the heavens" and had become imbedded in the soil. A person who had observed its fall dug it from the ground, carried it to his house and claimed it as his own. He later sold it to the defendant. Thereupon, the plaintiff, being the owner of the land upon which it fell, claimed ownership and the right of possession, and upon refusal by defendant to surrender it, brought replevin. The court held in substance that the aerolite, having fallen upon the land of plaintiff and become imbedded in the soil, became thereby a part of the soil so that it was from that time the property of the owner of the land and not of the person who found it, dug it up and removed it. But the court, hesitating somewhat, said: "Our conclusions are announced with some doubts as to their correctness but they arise not so much from the application of known rules of law to proper facts as from the absence of defined rules for these particular cases. The interest manifested has induced us to give the case careful thought. Our conclusions seem to us nearest analogous to the generally accepted

¹ Beardsley, Senator, in *McLaughlin v. Waite*, 5 Wend. 404, 21 A. D. 232; but see *Tancil v. Seaton*, 69 Va. (28 Gratt.) 601, 26 A. R. 380.

rules of law bearing on kindred questions, and to subserve the ends of substantial justice.”¹

§ 417. **Owner of Lost Property.** — The rights arising by virtue of the loss of personal property are somewhat peculiar in that at the same time there may exist in two persons a right of action for the interference with the possession of such property. As against all the world except the owner, the finder is entitled to the possession and, consequently, to the right of any action to protect such possession. But the owner, as against all the world, including the finder, has the right of possession, and may sustain an action for any interference therewith, not only against strangers, but against the finder or those who may have obtained possession from him. Thus, where the defendant once had possession, but parted with the property before suit, it was held that the owner was entitled to recover damages to the extent of the value of the property.² And if the finder, or any one claiming the property through him, refuses on demand to return the property to the owner, this is evidence of a conversion, and trover will lie.³ In one case, the finder had pledged the property, and on demand by the owner the pledgee refused to deliver it unless the owner should reimburse him for the amount of the pledge. The court held such facts a conversion and the pledgee liable in trover.⁴ And in another case, upon the owner's threatening suit against the finder, the latter took the property (a hen turkey and chicks) and turned them loose where he found them; and this was held a conversion by the finder.⁵

§ 418. **Owner of Stolen Property.** — It has been said in a previous section of this work,⁶ that public policy and private rights demand the rule now unvarying among the decisions that an owner cannot be divested of his property except by his own consent or by legal process. The application of this rule protects the owner from the machinations of a thief. And, as against such thief, the owner has the right to recover the property, without interference with the state's right to prosecute him criminally, or, if the property has been converted by sale or otherwise, the owner may have an action of trover for such conversion. However, the owner's right of action may operate against one obtaining the property from the thief, even though he be an innocent purchaser for value, unless such person restore the

¹ *Goddard v. Winchell*, 86 Ia. 71, 52 N. W. 1124, 41 A. S. R. 481, 17 L. R. A. 788.

² *Wood v. Pierson*, 45 Mich. 313, 7 N. W. 888; *Lawson on Personal Property*, 194.

³ *Adkins v. Blake's Admr.* 25 Ky. 40. But this does not apply to money or negotiable instruments which pass by delivery: *Garvin v. Wiswell*, 83 Ill. 215.

⁴ *Amory v. Flynn*, 10 Johns. 102, 6 A. D. 316.

⁵ *Ryan v. Chown*, 160 Mich. 204, 125 N. W. 46.

⁶ §§ 38 *et seq.*

property to its owner before action is brought.¹ This rule is unvarying, except in the case of stolen negotiable instruments,² in which case, while the owner may hold the thief for their value, as he may one obtaining the instruments with notice or without consideration, yet as against an innocent purchaser for value, a right of action does not exist in favor of the owner.³ A study of the cases cited in the sections above referred to,³ will dispense with further citation here to sustain the rules announced.⁴

§ 419. **Owner of Chattels Wrongfully Pledged.** — In accordance with the rule reiterated in this work that an owner cannot be divested of his property or his rights therein except by his own consent or by due process of law, it is well settled that an owner of property which has been wrongfully pledged by an agent, bailee or other person, may maintain trover for it as against the pledgee or any one obtaining the property from him and converting it to his own use. This rule has been uniformly adhered to unless modified by statute.⁵ "In England and several of the states in this country, statutes have been enacted for the protection of third persons who, in good faith, and in ignorance of any defects of title, advance money or incur obligations on the faith of property which is apparently owned by the persons with whom they deal, who, however, in fact, hold it merely as factors or agents, having been intrusted by the owner with possession of the property, or with documentary evidence of title to it. . . . Decisions controlled by such statutes have no bearing on this case, as we have no statute purporting to change the common law rule which protects the owner against an unauthorized pledge of his property by one who, as factor or agent to sell, has been intrusted with the possession and custody of it." ⁶

§ 420. **Illustrations of Same Subject.** — As illustrative of the rule announced, it appeared in one case that an employee was intrusted with certain jewelry to sell, upon his representation that he had a purchaser. After obtaining possession he pawned the jewelry ;

¹ *State v. Omaha Bank*, 59 Neb. 483, 81 N. W. 319.

² *Robinson v. Hodgson's Ex.* 30 Leg. (Pa.) 176.

³ §§ 38 *et seq.*

⁴ See, however, *Morgan v. Hodges*, 89 Mich. 404, 50 N. W. 876, 15 L. R. A. 458, in which it was held that even where there was an agreement between the owner of stolen property and an innocent purchaser for value that the former would accept part of the property as full satisfaction, the owner could still maintain trover against the purchaser for the rest of the property.

⁵ *Clay v. Sullivan*, 156 Ala. 392, 47 So. 153; *Charles, etc. Co. v. Logue*, 108 Ill. App. 128; *Paton v. Joliff*, 44 W. Va. 88, 28 S. E. 740; *People's Bank v. Huttig Co.*, 1 Ala. App. 394, 55 So. 929.

⁶ *Commercial Bank v. Hurt*, 99 Ala. 130, 12 So. 568, 42 A. S. R. 38, 19 L. R. A. 701; *Wright v. Solomon*, 19 Cal. 64, 79 A. D. 196.

and the court sustained an action against the pawnee and in favor of the owner for a return of the jewelry, or for its value in lieu of such return.¹ So, a factor cannot pledge the goods of his principal, and if he pledge them for his own debt, it is a conversion and trover will lie against him; and if the pledgee sell the property or refuse to deliver it on demand, trover will lie against him at the instance of the owner, for the pledge is void, and the property is not divested out of the owner.² "It is, we think, well settled that cotton factors and general commission merchants have no authority as such by law, or by any usage or custom of trade shown in the record, to deal with cotton consigned to them otherwise than by its sale for cash. They had no authority to sell upon credit cotton of their principal intrusted to them for sale, or to dispose of it in the way of barter, or to intrust its sale to others, or to pledge it as a security for an advance of money to themselves, or to ship it to a foreign market, or to deal with it in any way for their own instead of their principal's benefit." Therefore, the court held a pledgee from the factor liable to the owner as for a conversion.³

§ 421. **Same Subject.** — The rule discussed is based on the doctrine which is so well established as to be of uniform application, that no one can give a better title than he himself has. And it has been carried to an extent that a bailee of goods for safe-keeping merely, who pledges them with the intent to convert the proceeds to his own use is guilty of larceny, and can convey no title to his pledgee, though the latter acted in good faith throughout the transaction.⁴ Such a transaction amounts to a conversion by both the pledgor and pledgee whether the latter was informed of the true facts or not.⁵ A lucid exposition of the rule was given in a case where warehouse receipts had been wrongfully pledged by a bailee: "It is asked what security there is in loaning money upon a pledge of warehouse receipts? We answer, precisely the same security as in loaning upon the pledge and delivery of the property itself. If the person pledging the property is the owner, the security is good to the extent of its value, and so of the warehouse receipts. But if he

¹ *Frantz v. Winehill*, 124 La. 680, 50 So. 650; *Silverman v. Bush*, 16 Ill. App. 437; *Miller v. Schneider*, 19 La. Ann. 300, 92 A. D. 535; *Bowie v. Napier*, 1 McCord L. 1 (S. C.), 10 A. D. 641; *McCreary v. Gaines*, 55 Tex. 485, 40 A. R. 818.

² *Merchants Bank v. Trenholm*, 12 Heisk. (Tenn.) 520; *H. A. Prentice Co. v. Page*, 164 Mass. 276, 41 N. E. 279; *Warner v. Martin*, 11 How. 209, 13 L. Ed. (Y. S.) 667.

³ *Kauffman v. Beasley*, 54 Tex. 568; see *Michigan Bank v. Gardner*, 15 Gray 362; *Martin v. Moulton*, 8 N. H. 504; *Varney v. Curtis*, 213 Mass. 309, 100 N. E. 650, Ann. Cas. 1914A, 340.

⁴ *Newton v. Cardwell Co.*, 41 Col. 492, 92 Pac. 914.

⁵ *Thrall v. Lathrop*, 30 Vt. 307, 73 A. D. 306; *Lawson, Rights, Rem. & Proc.* 1755.

is not the owner, if he has stolen it, or if he is a bailee merely, and is attempting to make a fraudulent use of the property intrusted to his keeping, a person purchasing or receiving the property as security, does so in subordination to the title of the true owner. There are risks which men engaged in business must be content to encounter, and against which the law can afford no protection. The law can punish roguery, but it cannot secure innocent persons against losses from its multifarious devices.”¹

§ 422. **Lessors and Lessees; Lessors.** — As has been seen in previous sections of this work, and as will be more fully developed in the next chapter, it is necessary in order to sustain an action of trover that the plaintiff shall show his right to the possession of the property involved. In accordance with this requirement, a lessor of property must show his right of possession before he can maintain trover, either against the lessee, or against a third person. Thus, a preponderance of authority holds that in cases where the agreement between the owner of a farm and his tenant is that the former shall have a portion of the crop in lieu of rent money, the landlord's lien on the crop is not sufficient before a division is made to permit him to maintain trover for its conversion against a purchaser from the tenants.² The reason is that a lien is insufficient as a predicate for trover,³ since to sustain the action the lessor must have the right of possession, which he does not have prior to a division. And it does not strengthen the landlord's case that the purchaser from the tenant had notice of the lien.⁴ But if there has been a segregation of the landlord's portion, his special property thereby changes to absolute ownership coupled with the right of possession, and for a conversion thereof he may maintain trover. Thus, where a lessor had a lien on an entire crop and a bale of cotton was placed by a sub-tenant at the gin-house for the lessor and in satisfaction of his lien for rent, it was held that the lessor could maintain an action of trover against the creditors of the sub-tenant who seized the cotton and converted it.⁵

¹ *Burton v. Cuyrea*, 40 Ill. 320, 89 A. D. 350; *Palmer v. Hand*, 13 Johns. 434, 7 A. D. 392; *Skinner v. Dodge*, 4 Hen. & M. (Va.) 432; *Akron Co. v. Bank*, 3 Cal. App. 198, 84 Pac. 778; *Loring v. Brodie*, 134 Mass. 453; *Goodwin v. Mass. Etc. Co.* 152 Mass. 189, 25 N. E. 100.

² *Frink v. Pratt*, 26 Ill. Opp. 222, 130 Ill. 327, 22 N. E. 819.

³ *Street v. Nelson*, 80 Ala. 230. However, see *Taylor v. Felder*, 5 Tex. Civ. App. 417, 23 S. W. 480, where it was held that it was not necessary for the landlord to show that he was entitled to the possession of the crops at the time they were converted. As supporting the rule stated in the text, see *Corbitt v. Reynolds*, 68 Ala. 378.

⁴ *Anderson v. Bowles*, 44 Ark. 108.

⁵ *Steinhardt v. Bell*, 80 Ala. 208. See *Marlowe v. Rogers*, 102 Ala. 510; *Lloyd v. Powers*, 4 Dak. 62, 22 N. W. 492; *Campbell v. Bowen*, 22 Ind. App. 562, 54 N. E. 409; *Jordan v. Bryant*, 103 N. C. 59, 9 S. E. 135.

§ 423. **Same Subject.** — The exceptions to the foregoing rule are based on the relation of tenants in common which exists between the lessor and lessee prior to a division of the crop; and, since a sale or destruction of the property prevents a division, it is held that the lessor may treat either as a conversion, and, in case of sale, hold either the tenant or his vendee in trover.¹ The same rule prevails where the tenant wrongfully withholds from his landlord the portion of the crop to which he is entitled, or refuses to make division at the proper time.²

§ 424. **Same Subject; Actions for Fixtures.** — Question has frequently been made as to the respective rights of lessor and lessee to fixtures placed on leased premises by the lessee. As has been previously noted,³ when a tenant makes erections of a permanent character upon leased premises without the assent of the landlord, they become a part of the realty. And if the tenant, or another, attempt to remove them without authority, he will be answerable at the suit of the landlord for their conversion.⁴ But if fixtures have been added by the tenant for purposes of trade, he may remove them during the term of his tenancy. "If annexed by a tenant for purposes of trade, or some other immediate or temporary uses, or for ornament, he may indeed, while remaining in possession, sever them from the land, and thus change their character back again from realty to personalty; but if, without having done so, he voluntarily quits the premises at the expiration of the term without any special agreement with his landlord, neither he nor his vendee can afterwards claim them against the owner of the land."⁵ However, since trover lies only for personal property, and since fixtures, as long as they are annexed, are a part of the realty, it follows that trover does not lie to recover their value prior to their severance.⁶

§ 425. **Lessees.** — Where an agreement between an owner of a farm and the lessee thereof provides that the former shall receive a portion of the crops as his rental, the right of possession, prior to a division, is in the lessee; consequently, he is entitled to maintain

¹ *Gifford v. Meyers*, 27 Ind. App. 348, 61 N. E. 210; *Wilson v. Stewart*, 69 Ala. 302; *Tarpy v. Pering*, 27 Kan. 745; *Turner v. Waldo*, 40 Vt. 51.

² *Rohrer v. Babcock*, 126 Cal. 222, 58 Pac. 537; *Graves v. Walter*, 93 Minn. 307, 101 N. W. 297; *Sowles v. Martin*, 76 Vt. 180, 56 Atl. 979; *Smith v. Tindall*, 107 N. C. 88, 12 S. E. 121; *Johnson v. Shank*, 67 Ia. 115, 24 N. W. 749; *Channon v. Lusk*, 2 Lans. (N. Y.) 211; *Lobdell v. Stowell*, 37 How. 88, 51 N. Y. 70.

³ § 26 *et seq.*

⁴ *Washburn v. Sproat*, 16 Mass. 449; *Reid v. Kirk*, 12 Rich. (S. C.) 54.

⁵ *Bliss v. Whitney*, 9 Allen (Mass.) 114, 85 A. D. 745 citing *Gaffield v. Hapgood*, 17 Pick. 192, 28 A. D. 290; *Butler v. Page*, 7 Metc. (Mass.) 40, 39 A. D. 757; *Wall v. Hinds*, 4 Gray 256, 64 A. D. 64.

⁶ *Guthrie v. Jones*, 108 Mass. 196.

trover for a conversion of such crops. And this right exists in his favor against the landlord as well as against a stranger. Thus, where the landlord entered on the premises, seized the crops and evicted the tenant before his term had expired, it was held that the tenant was entitled to sue for the value of the crops, and that it was not a condition precedent to his right of action that he should sue to recover possession of the land.¹ So, any wrongful seizure or appropriation of a crop by the lessor, prior to division, will subject him to an action as for a conversion.² And the right thereupon accruing to the lessee will likewise inure to the benefit of a purchaser or the assignee of the tenant's interest in the crop.³

§ 426. **Same Subject; Where Fixtures Involved.** — As has been stated above, a tenant who has placed trade fixtures on the leased premises has the right to remove them together with his personal property at any time prior to the expiration of his term; or, if he be summarily evicted, he has a reasonable time thereafter to remove them. And in such cases if the landlord prevents the tenant from removing the fixtures, or other personal property which he has a right to take with him, he will be liable therefor in trover.⁴ Thus, where the landlord forcibly took possession of the premises, removed the tenant's goods, and refused to allow him to take them away, it was held that the tenant might maintain trover.⁵ In a case where the landlord had procured an injunction prohibiting the tenant from removing structures placed by the latter on the leased property, but which injunction had been dissolved and the tenant given a reasonable time thereafter to remove the structures, the landlord sold the premises to a *bona fide* purchaser who had no notice of the tenant's claim. The court held the landlord became thereby liable in trover.⁶ But a mere conveyance by the landlord while the tenant remains in possession cannot be held a conversion of fixtures that the tenant has a right to remove, since the right exists in his favor after the conveyance.⁷ The right to sue the landlord in trover also exists in favor of the tenant where the former has caused the issuance and levy of a distress warrant without right.⁸ Another instance of the right of

¹ Fagan v. Vogt, 35 Tex. Civ. App. 528, 80 S. W. 664. See McLaughlin v. Salley, 46 Mich. 219, 9 N. W. 256; Stafford v. Ames, 9 Pa. St. 343; Armitage v. Kistler, 5 Neb. (Unofficial) 233, 97 N. W. 1029; McClure v. Thorpe, 68 Mich. 33, 35 N. W. 829.

² Warner v. Abbey, 112 Mass. 355; Blake v. Coats, 3 Greene (Ia.) 548.

³ Perry v. Beaupre, 6 Dak. 49, 50 N. W. 400; Alexander v. Zeigler, 84 Miss. 560, 36 So. 536; Parker v. Brown, 136 N. C. 280, 48 S. E. 657.

⁴ Davis v. Taylor, 41 Ill. 405; Dame v. Dame, 38 N. H. 429; Crippen v. Morrison, 13 Mich. 23; Overton v. Williston, 31 Pa. St. 155; Parker v. Goddard, 39 Me. 144.

⁵ Hipple v. Puie, 51 Ill. 528.

⁶ Bircher v. Parker, 43 Mo. 443.

⁷ Davis v. Buffman, 51 Me. 160.

⁸ Drew v. Spaulding, 45 N. H. 472; Connah v. Hale, 23 Wend. 462.

a lessee to maintain trover was presented in a case where the tenant sued for the conversion of ore taken from a mine which he had the right to possess. And in the case the court held that the lessee might maintain trover against a person who was in the actual possession under a claim of right, for the wrongful conversion by the latter of unmined ore in the land, where the only possession the defendant had was such as enabled him to mine and convert the ore, and his claim of title was afterwards decided against him.¹

§ 427. **Executors and Administrators.** — It seems to have been neither doubted nor questioned that an executor or administrator succeeds to all the personal property and rights in respect thereto which were vested in the decedent at the time of his death. Accordingly, if the deceased's goods had been converted prior to his death, his right to maintain trover for such conversion passed to his executor or administrator.² And, since the executor or administrator is entitled to the possession of the personal effects of the deceased, he is the proper one to maintain trover for a conversion occurring after his appointment.³ Thus, where, at the time of his death, a deputy sheriff had in his possession goods which he had seized under a writ of attachment, it was held that his executor could maintain trover for their conversion by a stranger.⁴ And it has been held that an administrator who has not yet obtained possession may bring the action,⁵ although he must, at the time, have the right to the immediate possession of the property.⁶ In fact, the rule seems to be without dissent that, since the executor or administrator succeeds to the rights of the deceased, he may bring any action for the protection of those rights that the latter, if he had lived, could have maintained.⁷ Of course, a plaintiff cannot maintain the action as administrator when the right of possession exists in himself as an individual.⁸

§ 428. **Trespasser.** — "It has been held in Missouri,⁹ that one trespasser or wrong-doer cannot maintain trover against another wrong-doer who takes the property out of his possession. But it is

¹ *Hartford Ice Co. v. Cambria Co.*, 93 Mich. 90, 32 A. S. R. 488. See *Grubb v. Guilford*, 4 Watts. 223, 28 A. D. 700.

² *Towle v. Lovett*, 6 Mass. 394.

³ *Johns v. Nolting*, 29 Cal. 507; *Cullen v. O'Hara*, 4 Mich. 132; *Manwell v. Briggs*, 17 Vt. 176; *Jenkins v. McComico*, 26 Ala. 213.

⁴ *Badlam v. Tucker*, 18 Mass. 389, 11 A. D. 202.

⁵ *Kerby v. Quinn*, Rice (S. C.) 264.

⁶ *Mass. Life Ins. Co. v. Hayes*, 16 Ill. App. 233.

⁷ See, generally: *Sheldon v. Hoy*, 11 How. Pr. 11; *Allen v. Watson*, 5 N. C. 189; *Stewart v. Kearney*, 6 Watts 453, 31 A. D. 482.

⁸ *Hoover v. Wells*, 39 Miss. 445.

⁹ *Turley v. Tucker*, 6 Mo. 583, 35 A. D. 449.

not believed that this doctrine is consistent with principle or authority, because, as previously stated, the gist of the right to sue is not dependent upon the right of property in the thing converted, but the right of possession at the time of conversion, and a trespasser may hold property in his possession against any person who has not a better right, and a defendant can only justify upon the ground of a better title or right than the plaintiff had, and it has been held that mere naked possession, however acquired, is good as against a person having no right to the possession."¹ The doctrine stated, however, has not met universal approval; and I prefer the contrary holding, since to sustain the announced rule is seemingly to put a premium upon wrong-doing, or, at least, to lend countenance to it. In illustration of the contrary doctrine, a case arose in which it appeared that the plaintiff had, without express permission of the owner of land, placed a bee-hive in a tree upon the land, where it remained for something over two years, when the defendant, also acting without the express permission of the land owner, entered upon the land and carried away the hive, together with a swarm of bees that was then in it and the honey and honey-comb, and appropriated them to his own use. In an action of trover the court held that the plaintiff could not recover. "The plaintiff was a trespasser upon the land of Green from the beginning. He had no right to place the box or hive in the tree; and by placing it there he acquired no title to the bees which subsequently occupied it, or to the honey which they produced. Neither is it material to the issue for us to inquire whether the defendant, by taking the bees and honey away without previous permission from the owner of the land, was also a trespasser; for even admitting that he was does not in any way aid the plaintiff in this suit. The fact that A commits a trespass upon land of B, and carries away some of his personal property, would hardly be considered a cause of action in favor of C."²

§ 429. **Miscellaneous Instances of Right of Action.** — An assignment of his effects by a bankrupt passes to his assignee such rights, including that of possession, as the bankrupt had; consequently, where there has been a conversion of the goods, the assignee may maintain trover.³ And an agister has such an interest in cattle in

¹ 6 Wait's Actions & Defenses, 218, citing: *Knapp v. Winchester*, 11 Vt. 351; *Haslem v. Lockwood*, 37 Conn. 500, 9 A. R. 350; *Cook v. Patterson*, 35 Ala. 102; *Carter v. Bennett*, 4 Fla. 283; *Anderson v. Gouldberg*, 51 Minn. 294, 53 N. W. 636; *Wincher v. Shrewsbury*, 2 Scammon (Ill.) 283, 35 A. D. 108.

² *Rexroth v. Coon*, 15 R. I. 35, 23 Atl. 37, 2 A. S. R. 863. Also, see *Coffin v. Anderson*, 4 Blackf. (Ind.) 395; *McDonald v. Mangold*, 61 Mo. App. 291.

³ *Grimes v. Briggs*, 110 Mass. 446; *Bowdish v. Page*, 153 N. Y. 104, 47 N. E. 44.

his possession, including the right to retain such possession, that trover will lie in his favor when he has been wrongfully deprived of possession.¹ So, if the owner of property which has been converted sells it without retaking possession, his vendee may bring trover for the conversion.² Where a person who had made a voluntary assignment for the benefit of creditors withheld certain promissory notes which passed by the assignment, it was held that the assignee might bring trover against him for their conversion.³ Where a husband made an ante-nuptial agreement, surrendering all rights to the wife's property, it was held that if he wrongfully converted it he was liable in trover.⁴ One in possession of materials which he has agreed to manufacture into certain articles has such right therein against all persons except the owner or one to whom he has in good faith sold them,⁵ as that he may bring trover for a conversion of such material or the articles manufactured therefrom.⁶ A vendor who has warranted the title to goods may, after mutual rescission of the contract of sale, maintain trover for the goods against one who has taken them from the possession of the vendee under a claim of title.⁷ But a creditor without a judgment lien cannot maintain the action.⁸ According to the common law relating to assignment of choses in action, the right to bring trover could be maintained only by him who had the right of possession at the time of the conversion.⁹ But by a liberal construction of the codes, if not by express statutory enactment, it is now the rule in many states that the right of action for the conversion is assignable, and upon sale of the property there passes to the purchaser a right of action for its previous conversion.¹⁰ So, if the consignor of goods have the right to their immediate possession, he may bring an action for their conversion,¹¹ as may also the consignee after he has accepted the consignment or made advances upon it.¹²

¹ *Betts v. Mouser*, Wright 744.

² *Tome v. Dubois*, 73 U. S. 548, 18 L. Ed. 943.

³ *Burrows v. Keays*, 37 Mich. 431.

⁴ *Albee v. Cole*, 39 Vt. 319.

⁵ *Knight v. Sackett Co.*, 19 N. Y. Supp. 712, 141 N. Y. 404, 36 N. E. 392.

⁶ *Shaw v. Kaler*, 106 Mass. 448.

⁷ *Williamson v. Sammons*, 34 Ala. 691.

⁸ *Cranmer v. Blood*, 57 Barb. 155, 48 N. Y. 684.

⁹ *Dunklin v. Wilkins*, 5 Ala. 199; *Stodgel v. Fugate*, 2 A. K. Marsh (Ky.) 136.

¹⁰ *Dickson v. Merchants Co.*, 44 Mo. App. 498; *New Liverpool Co. v. Western Co.*, 151 Cal. 479, 91 Pac. 152; *McArthur v. Green Bay Co.*, 34 Wis. 139; *McKee v. Judd*, 12 N. Y. 622, 64 A. D. 515; *Smith v. Thompson*, 94 Mich. 381, 54 N. W. 168; *Jordan v. Gillen*, 44 N. H. 424.

¹¹ *Hardy v. Monroe*, 127 Mass. 64.

¹² *Brown v. Bome*, 7 N. Y. St. 387; *Fitzhugh v. Wiman*, 9 N. Y. 559.

CHAPTER VIII

TITLE AND POSSESSION NECESSARY

§ 430. Absolute ownership.	§ 441. Action by owner of land.
§ 431. Same subject; general principles.	§ 442. Same subject.
§ 432. What possession sufficient.	§ 443. Same subject; where trees cut.
§ 433. When absolute owner cannot sue.	§ 444. When title without possession sufficient.
§ 434. Special interest.	§ 445. Possession without title.
§ 435. Illustrations of same subject.	§ 446. Illustrations of same subject.
§ 436. Equitable title.	§ 447. Same subject; action by receiptor.
§ 437. Title through fraud.	§ 448. Action by possessor against true owner.
§ 438. Where defendant without title.	§ 449. Constructive possession; when sufficient.
§ 439. Title without possession.	
§ 440. Illustrations of same subject.	

§ 430. **Absolute Ownership.** — The courts seem to be in harmony in holding that a general or special property, coupled with possession or a present right of possession is an interest entitling one to bring trover for a conversion of the property. From this rule it is seen that it is not essential that one should be the absolute owner of the property before he can maintain the action. In fact the question of ownership is of secondary importance in this action. One may unqualifiedly be the owner of personal property, and yet have so divested himself of a present and temporary right to it as to transfer to another the sole right to sue for a conversion. And then again, the absolute owner may have conveyed to another such an interest in the property as that either of them may have an action for the conversion of it. Such is the case in a simple bailment of a chattel in which, for a conversion of the property, either the bailor or bailee may sue,¹ it being understood, however, that this is where the owner has the right to resume possession at any time. It was said in an English case: "To maintain trover, the plaintiff must have either the absolute or a special property in the goods that are the subject

¹ 2 Chitty's Pleading, 618.

of the action; he need not have both; either the one or the other is sufficient. Absolute property is where one, having the possession of chattels, has also the exclusive right to enjoy them, and which can only be defeated by some act of his own. Special property is where he who has the possession holds them subject to the claims of other persons. There may be special property without possession; or there may be special property arising simply out of a lawful possession, and which ceases when the true owner appears.”¹

§ 431. **Same Subject; General Principles.** — What title and possession are necessary in plaintiff as a condition precedent to his right to maintain trover has been variously stated by the courts; and while the expressions used seem to differ some in meaning, yet the conclusions are deducible to one underlying principle. Thus, it has been said that in an action of trover, it is necessary for the plaintiff to show title to the property, an immediate right of possession, and a conversion by the defendant.² But this authority, while holding that title is a necessary conjunct of possession, does not limit, qualify or explain what title is meant — whether an absolute title or a special interest. Then again, it has been said: “In an action of trover and conversion, as in an action of ejectment, the plaintiff must recover upon the strength of his own title, without regard to the weakness of that of his adversary. Like that, this is a possessory action and the plaintiff must show that he has either a special or general property in the thing converted, and the right to its possession.”³ And again: “To maintain trover, plaintiff must prove property in himself and the right of immediate possession.”⁴ Some authorities say that in order to maintain trover a plaintiff must have an interest, absolute or special, in the property converted, or he must have had, at the time of the conversion, either possession or the right of immediate possession.⁵ These authorities, as seen, give a right of action where plaintiff has either a property right, or a possessory right. But there are a long line of authorities holding that in order to maintain the action plaintiff must have both a property interest and either possession or the right to instant possession.⁶ The rule

¹ *Webb v. Fox*, 7 T. R. 391.

² *Whitlock v. Heard*, 13 Ala. 776, 48 A. D. 73.

³ *Davidson v. Waldron*, 31 Ill. 120, 83 A. D. 206.

⁴ *Ames v. Palmer*, 42 Me. 197, 66 A. D. 271.

⁵ *Painter v. McGaba*, 6 Ga. App. 54, 64 S. E. 129; *Penn. Ry. Co. v. Hughes*, 39 Pa. St. 521; *Johnson v. Blaney*, 198 N. Y. 312, 91 N. E. 721; *Baker v. Barn*, 17 Ind. App. 422, 46 N. E. 930; *Jos. Dickson Co. v. Paul*, 167 Fed. 784, 93 C. C. A. 204; *Vincent v. Cornell*, 13 Pick. 294, 23 A. D. 683.

⁶ *Odiorne v. Cooley*, 2 N. H. 66, 9 A. D. 39; *Clark v. Dean*, 143 Mass. 292, 9 N. E. 651; *Herring v. Tilghman*, 35 N. C. 392; *Holman v. Ketchum*, 153 Ala. 360, 45 So. 206; *Hunter v. Cronkhite*, 9 Ind. App. 470, 36 N. E. 924; *Tribble v. Laird*, 92 Ga. 686,

adhered to by the cases last cited has been expressed as follows: "Though possession alone will sometimes enable a party to maintain trespass, yet trover will not lie without evidence of property in the plaintiff; because in trespass, if plaintiff had only the naked custody of the articles, he ought not to be disturbed in it by anybody but the owner; and hence may recover for the mere injury to his possession against a wrong-doer. While in trover, which is not predicated on a disturbance of the possession of the plaintiff, but on a conversion of his property, the plaintiff must prove his property in the articles, and also his right to the present custody of them."¹

§ 432. **What Possession Sufficient.** — But the true rule is, and it is believed that on principle the adjudications may be harmonized upon this: That possession, or the right of present possession at the time of a conversion of chattels is sufficient as a predicate for trover in all cases where the defendant cannot show a better right, since possession carries with it a presumption of ownership;² but as to the true owner or one claiming under him,³ as well as in cases where plaintiff cannot show a right of immediate possession except by proving a property right,⁴ the plaintiff cannot prevail in trover unless he show title in himself, either general or special.⁵ In line with this statement of the rule, it has been said: "In order to maintain trover it is necessary that the plaintiff should have either a special or absolute property in the goods which are the subject of the action. He who has the absolute or general property may support this action, though he had never had the actual possession; for it is a rule of law

19 S. E. 26; *Parker v. Lisbon Bank*, 3 N. D. 87, 54 N. W. 313; *Kansas City Ry. Co. v. Wayland*, 134 Ala. 388, 32 So. 744; *Blakey v. Douglass*, 3 Pa. Cas. 495, 6 Atl. 398; *Layman v. Clocomb*, 76 Atl. 1094; *Stevenson v. Fitzgerald*, 47 Mich. 166, 10 N. W. 185; *Hodge v. Railway Co.*, 70 Minn. 193, 72 N. W. 1074; *Kreider v. Fanning*, 74 Ill. App. 230.

¹ *Odiorne v. Cooley*, *supra*.

² *Goodwin v. Garr*, 8 Cal. 615; *Stockbridge v. Crockett*, 15 Tex. Civ. App. 69, 38 S. W. 401; *Standard Fur. Co. v. Van Alstine*, 31 Wash. 499, 72 Pac. 119; *Barker v. Lewis Co.*, 79 Conn. 342, 65 Atl. 143; *Coffin v. Anderson*, 4 Blackf. 395; *Rosencranz v. Swofford Bros. Co.*, 175 Mo. 518, 65 S. W. 445; *Col. Bank v. Brown*, 85 Tex. 80, 23 S. W. 862; *Marcy v. Parker*, 78 Vt. 73, 62 Atl. 19; *Van Lessler v. Ann Arbor Ry.*, 133 Mich. 664, 95 N. W. 610; *Wolf v. Shepherd*, 103 Ala. 241, 15 So. 519.

³ *Wheeler v. Lawson*, 103 N. Y. 40, 8 N. E. 360; *Skinner v. Pinney*, 19 Fla. 42, 45 A. R. 1; *Craig v. Miller*, 34 N. C. 375; *McKeen v. Converse*, 68 N. H. 173, 39 Atl. 435.

⁴ *Haynes v. Hobbs*, 136 Mich. 117, 98 N. W. 978; *Webster v. Heylman*, 11 Mo. 428; *Gaskill v. Barbour*, 62 N. J. L. 530, 41 Atl. 700; *Jaques v. Stewart*, 81 Ga. 81, 6 S. E. 815; *Perley v. Dole*, 40 Me. 139; *Vanderburgh v. Bassett*, 4 Minn. 242; *Rogers v. Dutton*, 182 Mass. 187, 65 N. E. 56; *Green v. Burr*, 131 Cal. 236, 63 Pac. 360; *Smith v. Donahue*, 13 S. D. 334, 83 N. W. 264; *Feist v. Prince*, 22 Misc. 358, 49 N. Y. Supp. 280; *Hyde Park Co. v. Shepardson*, 72 Vt. 188, 47 Atl. 826.

⁵ *Clapp v. Glidden*, 39 Me. 448; *Milligan v. Mackinlay*, 108 Ill. App. 609, 70 N. E. 685; *Deering v. Austin*, 34 Vt. 330; *Overton v. Williston*, 31 Pa. St. 155; *Wilson v. Hoffman*, 93 Mich. 72, 52 N. W. 1037, 32 A. S. R. 485. See *Dekle v. Calhoun* (Fla.) 53 So. 14.

that the property of personal chattels draws to it the possession, so that the owner may bring either trespass or trover, at his election against a stranger who takes them away.”¹

§ 433. **When Absolute Owner cannot Sue.** — It is not meant by the above rule, nor by the decision quoted, that the absolute owner has at all times the right to maintain trover for the conversion of his chattels; for, as will presently be shown, before an absolute owner can maintain the action he must have coupled with his title a present possession or right of immediate possession. Another apparent distinction has been introduced into the question under discussion, and that is that the plaintiff must have had either the actual custody of the property or an interest therein with the right of immediate possession. This view of the matter has been thus expressed: “It seems to be well settled that the plaintiff, in trespass *de bonis asportatis* or trover, in order to maintain the action, must have had, at the time of the injury complained of, either the actual custody of the thing injured or taken, or a property in it, either general or special, with the right to immediate possession. If he had the actual custody of the thing, even wrongfully, he may maintain the action against every one whose right is not superior to his. Perhaps a mere servant could not be said to have any such custody. His possession is that of the master. The general owner of a chattel may always maintain the action, unless he have parted with the possession for a definite term.”² And, in a later case in the same state it was said: “The questions arise whether the plaintiff has that interest or title to the property itself which will enable him to sustain the action of trover. To sustain the action, the plaintiff must show a title to the property converted, either general or special, and his right to the immediate possession of it.”³

§ 434. **Special Interest.** — It is the consensus of the authorities that in order for the owner of a special interest in converted chattels to maintain trover for such conversion, he must, in addition to his right arising by reason of his special interest, have had actual possession, or the right of immediate possession. In other words, his special interest is not of itself a sufficient predicate for the action. Thus, as has been seen in a previous section,⁴ the finder of lost chattels has a special interest in them and as against any one interfering with his possession, except the owner or one claiming under him, he may

¹ *Bird v. Clark*, 3 Day (Conn.) 272, 3 A. D. 269.

² *Swift v. Moseley*, 10 Vt. 208, 33 A. D. 197.

³ *Baxter v. Bush*, 29 Vt. 465, 7 A. D. 429. See, to same effect, *Ames v. Palmer*, 42 Me. 197, 66 A. D. 271.

⁴ *Ante*, §§ 412 *et seq.*

have his action of trover.¹ So, where a debtor delivered to his creditor certain personal property with instructions to sell it and pay the indebtedness, it was held that the creditor had a sufficient interest when coupled with his possession, to maintain trover for the conversion of the chattels.² But in a case where the owner of chattels had given to plaintiff a written order authorizing him to sell the chattels and collect the proceeds, it was held that plaintiff had no such interest as would enable him to sustain trover against defendant for a conversion of the property.³ And where the owner had delivered personal property to his creditors to sell and apply the proceeds on the indebtedness, but after a time they allowed possession to revert to the owner, it was held that the creditors did not have sufficient interest in the property to enable them to maintain trover against an officer who had taken the property under attachment against the debtor.⁴

§ 435. **Illustrations of Same Subject.**—Parallel instances of what is and what is not sufficient title to enable one to maintain trover for the conversion of chattels are found in cases of lessor and lessee. And here it is the rule that the lessor, although the title and general ownership of the property are in him, cannot maintain trover against one who takes it from the possession of the lessee and converts it to his own use, unless the lessee has so acted with the property as to practically terminate the lease, in which event the lessor again becomes entitled to possession, and this, together with his general ownership, gives him a right of action.⁵ But during the continuance of the term, the lessee alone is entitled to an action of trover, for his special interest by reason of the lease, together with his possession thereunder, is superior to the general rights of property; and the lessor may be held to such action, as well as a stranger.⁶ So, a simple bailment passes a sufficient interest to the bailee to enable him to bring the action. Thus, where goods had been delivered to a carrier to be transported, and by mistake the carrier delivered them to the wrong person, it was held that the carrier still had constructive possession and that it was entitled to maintain trover against the person to whom the goods were wrongfully delivered.⁷ And a pledgee of

¹ *Tancil v. Seaton*, 28 Gratt. (Va.) 601; *Clark v. Malloney*, 3 Harr. (Del.) 68; *N. Y. etc. Ry. Co. v. Hawes*, 56 N. Y. 175.

² *Smith v. Mayberry*, 61 Ark. 515, 33 S. W. 1068.

³ *Swenson v. Kleinschmidt*, 10 Mont. 473, 26 Pac. 198.

⁴ *Colby v. Cressy*, 5 N. H. 237.

⁵ *Billings v. Tucker*, 6 Gray 368; *Harvey v. Epps*, 12 Gratt. (Va.) 153; *Grant v. King*, 14 Vt. 367.

⁶ *Hickok v. Burt*, 22 Vt. 15.

⁷ *Cheshire Ry. Co. v. Foster*, 51 N. H. 490; *Ill. Cent. Ry. Co. v. Parks*, 54 Ill. 74; and the owner has the like right to maintain the action: *Bartlett v. Hoyt*, 33 N. H. 151.

chattels has a like right of action. And, without multiplying instances, it may be generally said that the owner of any special interest in personal property may have an action of trover for a conversion thereof, even against the general owner, during the time he was in possession or entitled to the possession.¹

§ 436. **Equitable Title.** — It is the general rule that an equitable title is not sufficient as a predicate for trover, but whatever the interest, whether general or special, it must be founded on legal title.² Thus, it has been held that trover cannot be maintained by a plaintiff who has a reversionary estate in the chattels converted.³ The reason of this is that the plaintiff has not the right of present possession. The following quotation will serve well to exemplify the principle upon which the authorities hold to the rule announced: "The declaration is for the conversion of personal property. To maintain the action of tort in the nature of trover, the plaintiff must have the legal title to the property in question, and must show possession or a right to immediate possession. It is not enough that he shows an equitable title, such as a right to redeem, or a reversionary interest subject to the present legal title of another. The whole legal title and right of possession passes to the mortgagee by a mortgage of personal property, and is defeated only by the performance of the condition. The plaintiff's interest in this property is that of a second mortgagee. The legal title and right of immediate possession at the time of the alleged conversion was in the holder of the first mortgage, to whom alone the defendant is liable in this form of action. The defendant cannot be held in two actions of the same kind, at the same time, for the same tort, in favor of different persons. Nor can the rights of the holder of the first mortgage be defeated."⁴

§ 437. **Title through Fraud.** — In all actions of trover where it is necessary for plaintiff to show title in himself, it is requisite that such title shall be a valid one; since fraud vitiates a contract under which title may pass, it prevents the enforcing of such rights as would have

¹ *Edwards v. Dooley*, 120 N. Y. 540, 24 N. E. 827; *Burt v. Dutcher*, 34 N. Y. 493; *Ripley v. Dolbier*, 18 Me. 382; *Moran v. Portland Co.*, 35 Me. 55; *Hopper v. Miller*, 76 N. C. 402; *Brown v. Dempsey*, 95 Pa. St. 243; *Overby v. McGhee*, 15 Ark. 459; *Steele v. William*, Dud. L. (S. C.) 16, 31 A. D. 546.

² *Edwards v. Welton*, 25 Mo. 379; *Draper v. Walker*, 98 Ala. 310, 13 So. 595; *Bryan v. Hampton*, 57 Hun 585, 10 N. Y. Supp. 372.

³ *Lewis, Admr. v. Mobley*, 4 Dev. & B. L. (N. C.) 323, 34 A. D. 379.

⁴ *Ring v. Neale*, 114 Mass. 111, 19 A. R. 316, citing: *Landon v. Emmons*, 97 Mass. 37; *Rugg v. Barnes*, 2 Cush. 591; *Goodrich v. Willard*, 2 Gray 203. See *Baker v. Seavey*, 163 Mass. 522, 40 N. E. 863, 47 A. S. R. 475; *Crain v. Paine*, 4 Cush. 483, 50 A. D. 807 and other Massachusetts cases cited. *Kennett v. Peters*, 54 Kan. 119, 37 Pac. 999, 45 A. S. R. 274; *Farrow v. Wolley & Jordan*, 149 Ala. 373, 43 So. 144; *Alexander v. Meyenberg*, 112 Ill. App. 223; *McNeil v. Hall*, 107 N. Y. App. Div. 36, 94 N. Y. Supp. 920, 80 N. E. 113.

accrued had there been no fraud. Thus, where a conveyance of chattels had been fraudulently made to defeat creditors, it was held that the grantee could not maintain trover against an officer who attached the property at the instance of the creditors of the grantor.¹ And where it was shown that plaintiff had obtained possession of certain bank notes by means of a forgery, he was held to have no right of action for their conversion.² So, where an owner of chattels had transferred them for the purpose of defeating his creditors, it was held that he could not maintain trover against his grantee for a conversion of the chattels.³ In the last case cited it was said: "That a collusive contract binds the parties to it, is a principle which commends itself no less to the moralist than to the jurist; for no dictate of duty calls on a judge to extricate a rogue from his own toils. On the other principle a knave might gain, but could not lose, by a dishonest expedient; and we should but administer provocatives to unfair dealings, did we repair the cross accident of an unsuccessful trick. It is, therefore, in accordance with a wise and liberal policy, which requires the consequences of a fraudulent experiment to be made as disastrous as possible, that a fraudulent bargainee is assisted — assisted for no merit of his own, but for the demerit of his confederate."⁴

§ 438. **Where Defendant without Title.** — The language of the authorities is that a plaintiff in trover must recover on the strength of his own title and not on the weakness of that of his adversary.⁵ This rule was well exemplified in a case wherein the defendant had taken the chattels involved and they had been sold by order of court under a judgment in favor of the defendant and another and against a corporation which was a stranger to the action in trover. In his reply, plaintiff alleged that the corporation had no legal existence. But the court held that the plaintiff's right of action was limited to his own title and that therefore he could not recover by showing that defendant had no title.⁶ So, where plaintiff's claim to the property in defendant's possession was invalid because obtained by him from a person who never had any valid title, it was held that plaintiff

¹ *Hartshorn v. Williams*, 31 Ala. 149.

² *Coffin v. Anderson*, 4 Blackf. 395.

³ *Stewart v. Kearney*, 6 Watts 453, 31 A. D. 482.

⁴ See: *Mulligan v. Bailey*, 28 Ga. 507; *Peacock v. Hendricks*, 8 Gill & J. 421; *Whittle v. Bailes*, 65 Mich. 640, 32 N. W. 874; *Herman v. No. Pac. Ry.*, 43 Wash. 624, 86 Pac. 1068; *Tuttle v. Cone*, 108 Ia. 468, 79 N. W. 267; *Swope v. Paul*, 4 Ind. App. 463, 31 N. E. 42; but see *Greiner v. Hild*, 124 Mich. 222, 82 N. W. 1052; *Terry v. Metevier*, 104 Mich. 50, 62 N. W. 164.

⁵ *Davidson v. Waldron*, 31 Ill. 120, 83 A. D. 206.

⁶ *Zunkle v. Cunningham*, 10 Neb. 162, 4 N. W. 591; *Ekstrom v. Hall*, 90 Me. 186. 38 Atl. 106; *Easter v. Fleming*, 78 Ind. 116.

could not recover because the defendant, being in possession, had a right to retain the property against every one, except a person having a superior right.¹ And where plaintiff claimed that property seized under an execution as that of another was in fact his, in an action of trover by him it was held that he must show title in himself and not lack of title in the defendant.² In this regard, the action resolves itself into the nature of a possessory action, and plaintiff must, as in an action of ejectment, look strictly to his own title.³

§ 439. **Title without Possession.** — It is a general rule, subject to the exceptions presently to be noted, that even though a party be the owner of a chattel, he cannot maintain trover for its conversion unless he also have possession or the right of immediate possession.⁴ This rule was well exemplified in a case where the plaintiff had let a mare to another for hire for a certain term, and before the expiration of the term the other sold her to defendant who, upon demand of plaintiff, refused to return her. The opinion of the court is short and clearly to the point here under discussion: "It is very clear that if the plaintiff in this case had, at the time he demanded the mare of the defendant, no right to the possession, this action cannot be maintained. And if the contract between the plaintiff and Brown was still, at the time, in force, the plaintiff certainly had not the right of possession. But it is said, on behalf of the plaintiff, that the contract between plaintiff and Brown was at an end; that Brown had the mare to use, not to sell, and that the sale was a wrongful act, which authorized the plaintiff to consider the contract at an end, and to claim the possession of the mare wherever she could be found. We are, on the whole, of the opinion that this argument is unanswerable. The sale of the mare was, under the circumstances, a conversion of the property, and most clearly put an end to the contract. The plaintiff is therefore entitled to judgment."⁵

§ 440. **Illustrations of Same Subject.** — From the cases cited it is gathered that a general owner of a chattel cannot maintain trover therefor during the continuance of a definite term for which

¹ *Raines v. Perryman*, 29 Ga. 529; *Mulligan v. Bailey*, 28 Ga. 507; *Kennington v. Williams*, 30 Ala. 361.

² *Van Zaudt v. Shuyler*, 2 Kan. App. 118, 43 Pac. 295; *Holmes v. Bailey*, 16 Neb. 300, 20 N. W. 304.

³ See *Mallory v. Union Stock Yards*, 157 Ill. 554, 41 N. E. 888, 48 A. S. R. 341.

⁴ *Pac. Livestock Co. v. Isaacs*, 52 Ore. 54, 96 Pac. 460; *Bryne v. Weidenfeld*, 113 N. Y. App. Div. 451, 99 N. Y. Supp. 412; *Farmers Bank v. McKee*, 2 Pa. St. 318; *Newlin v. Prevo*, 90 Ill. App. 515; *Raymond Syndicate v. Gutenlag*, 177 Mass. 562, 59 N. E. 446; *Andrews v. Shaw*, 15 N. C. 70; *Clark v. Draper*, 19 N. H. 419.

⁵ *Sanborn v. Colman*, 6 N. H. 14, 23 A. D. 703; *Steele v. Williams*, Dud. (S. C.) 16, 31 A. D. 546; *Langhenry v. Chicago Bank*, 70 Ill. App. 200; *Lexington Ry. Co. v. Kidd*, 7 Dana (Ky.) 245; *Hardy v. Munroe*, 127 Mass. 64.

he has parted with possession; but where a bailee, during the term of the bailment, has put the chattel to a different use from that for which it was bailed, the owner thereupon becomes entitled to the immediate possession — since the contract of bailment is *ipso facto* ended — and may maintain trover for its conversion.¹ And in a case where plaintiff had delivered to a tanner certain hides, the latter to share in the profits as compensation for his services, it was held that the owner could bring trover against one claiming the hides as assignee of the tanner.² So, where plaintiff had purchased a chattel at auction, but the vendor had refused to deliver it, plaintiff was allowed to recover its value in trover.³ And where defendant agreed to sell to plaintiff certain horses for a price named, which plaintiff paid and which defendant accepted, but defendant then refused to deliver the horses, it was held that plaintiff was entitled to sue in trover for the value of the horses.⁴ And where an owner of goods delivered them to an agent who was to keep them in his custody, it was held that the owner could sustain trover against one who took the goods from the agent's possession.⁵ But the controlling principle in such a case is that the possession of the agent is that of the principal, so that, in fact, the goods were taken from the possession of the owner.

§ 441. **Action by Owner of Land.** — The rule under discussion has received from one line of authorities approval and from another criticism in cases where it has been sought to bring trover by the owner of land against an adverse occupant for injury to the realty — such as the wrongful cutting of timber, or removal of rock — during the continuance of such adverse occupancy. The rule is stated by Judge Freeman to be that “trover will not lie against an adverse occupant for timber or crops cut, or products of the land taken by him, and the like, for the plaintiff in these actions must be entitled to the immediate possession, which he is not while in the possession of the soil. . . . But against the adverse occupant, and while he is in possession, the owner has no remedy for injuries to the realty but the remedy is in the person who has the possession; and if this person be an adverse occupant, he may have an action against any one but the owner, or those claiming under him, for injuries done to

¹ *Swift v. Moseley*, 10 Vt. 208, 33 A. D. 197. See *Johnson v. Whittemore*, 27 Mich. 469; *Baehr v. Downey*, 133 Mich. 163, 94 N. W. 750, 103 A. S. R. 444; *Forth v. Pursley*, 82 Ill. 162; *Morse v. Crawford*, 17 Vt. 499.

² *Hyde v. Cookson*, 21 Barb. 92.

³ *Simmons v. Anderson*, 7 Rich. L. (S. C.) 67.

⁴ *Miller v. Koger*, 28 Tenn. 231.

⁵ *Thorp v. Burling*, 11 Johns. 285.

the realty, since the injury is to the possession.”¹ And he further says: “Sufficient has now been said to show that possession, either actual or constructive, is indispensable to enable the owner of land to maintain an action for an injury thereto. But an owner of the legal title is not wholly without remedy for trespass committed upon and injuries done to the land while it is in the adverse possession of another. He may regain the possession either by re-entry, or by ejectment, and then by means of the doctrine of relation, which supposes him to have been in possession continuously since his disseisin, he may have his action and recover for immediate damages. . . . After re-entry, the owner having possession by relation, may bring trover against a person who, with knowledge of the title to the property cut and carried away timber while the owner was out of possession.”²

§ 442. *Same Subject.* — These views have been elsewhere stated to be that the owner of the freehold cannot maintain a personal or transitory action to recover a part of the freehold, or damages for conversion thereof, which has been converted into personalty by a severance from the freehold, if at the time of the severance he has not actual or constructive possession of the land, since title to land cannot be inquired into in purely personal actions.³ And in holding that even in a case where plaintiff had the right of possession of a tract of land he could not recover in trover for stone and gravel dug therefrom by one who had the actual adverse possession and claimed title to the land, one court said: “There is a dictum in many books that possession is not necessary for the support of an action of trover. I think it will be found that this broad assertion is not true, if taken in its full extent, and without qualification. On the contrary, we find it laid down in 5 Bac. tit. Trover, C., that no person can maintain trover unless he has had a possession of as well as property in the chattel, for the conversion of which the action is brought. And this principle, when explained, appears to be the law. The explanation is that he who has the general property in a personal chattel need not prove the possession, for the law draws the possession to the property. But he who claims only a special property must prove that he once had actual possession, without which no special property is complete. That the law draws the possession to the property of personal chattels, unconnected with land, may be true, and yet

¹ Note to 85 A. D. 332, citing: *Renick v. Boyd*, 99 Pa. St. 555, 44 A. R. 124; *Davis v. Easley*, 13 Ill. 192; *DeMott v. Hogehman*, 18 Ill. 443; *Sweetland v. Stetson*, 115 Mass. 49; *Welch v. Jenks*, 58 Ia. 694; *Douglas v. Dickson*, 31 Kan. 310, 1 Pac. 541; *Herbert v. Lege*, 29 La. Ann. 511; *Keith v. Tilford*, 12 Neb. 271, 11 N. W. 315.

² *Id.*, citing *Heath v. Ross*, 12 Johns. 140.

³ *Aldrich Mining Co. v. Pearce*, 169 Ala. 161, 52 So. 911.

it does not follow that the possession is drawn in like manner to the property of that kind of chattel, which was part of the soil, until severed from it, when the soil itself, at the moment of severance, was held adversely by another. I should rather suppose that in such case, he who had possession of the land had possession also of the stones dug from it, and against him another person who had the right to the possession of the land could not maintain trover." And the court concludes that since they find no authority for supporting an action of trover by him who had the right of possession against him who had the actual adverse possession under a claim of title to the land, the plaintiff had no cause of action.¹ This same doctrine was established in North Carolina where it was said that when one who is in the adverse possession gathers a crop in the course of husbandry, or severs a tree or other thing from the land, the thing severed becomes a chattel, but it does not become the property of the owner of the land; but his title is divested — he is out of possession and has no right to the immediate possession of the thing, nor could he bring any action until he regains possession.²

§ 443. **Same Subject; Where Trees Cut.** — But the doctrine of these cases has received merited criticism, and in a well-considered case in Mississippi, the case of *Brothers v. Hurdle*, *supra*, was especially noticed, and its doctrine repudiated.³ There it was said that trover or trespass *de bonis asportatis* can be maintained by the disseisee, the true owner, after re-entry, for the value of the trees cut by the first or second disseisor or their grantees intermediate the disseisin and such re-entry.⁴ And the New York case cited is quoted as declaring in reference to the contrary doctrine that "If that is the law, any irresponsible person may turn the true owner forcibly out of possession of his real estate, sell the building and the timber, and thereby destroy the value of the property; he may sell it, too, under ever so suspicious circumstances and according to the doctrine quoted, the purchaser is safe, and the owner has no remedy." In accordance with the weight of authority, it has been said that where trees, or anything else attached to the freehold, are unlaw-

¹ *Mather v. Trinity Church*, 3 Serg. & R. (Pa.) 509, 8 A. D. 663, followed in *Harlan v. Harlan*, 15 Pa. St. 507; *Stafford v. Ames*, 9 Pa. St. 344.

² *Brothers v. Hurdle*, 10 Ired's. Law 490, 51 A. D. 400; followed in *Branch v. Morrison*, 5 Jones 18, 6 Jones 17, 69 A. D. 770. And the same principle is adhered to in *Wright v. Guier*, 9 Watts 172, 36 A. D. 108; but it was there held that trover would lie since the act of conversion had been committed by one who was merely a trespasser and not in adverse possession.

³ *Alliance Trust Co. v. Nettleton Co.*, 74 Miss. 585, 21 So. 396, 60 A. S. R. 531.

⁴ Citing: *Evans v. Miller*, 58 Miss. 120, 38 A. R. 313; *Harris v. Newman*, 5 How. (Miss.) 654; *Morgan v. Varick*, 8 Wend. 587; *Trubel v. Miller*, 48 Conn. 347, 40 A. R. 177; *Green v. Biddle*, 8 Wheat. (U. S.) 75.

fully detached, the property thus wrongfully separated from the freehold, becomes the personal property of the owner of the inheritance; and when a tenant or other person in possession commits waste by cutting timber, he acquires no title thereto and of course can convey none; and a *bona fide* purchaser from him acquires no title, but is liable to the true owner in trover.¹ As between the true owner and a wrong-doer, the title to what is severed from the freehold is not changed by the severance, whatever may be the case as to strangers. If the true owner may keep his own property when he gets it, why may he not get it if another has it? The law, after re-entry, supposes the freehold to have always existed in the party re-entering. As has been said, "The answer to the objection is found in the ejectment suit and recovery. The plaintiff was all along in actual possession according to his right. His actual possession, acquired by ejectment or entry, relates to the time when his title was acquired, not only as against the defendant in ejectment, but all other wrong-doers."²

§ 444. **When Title without Possession Sufficient.** — It has been held that if the conversion of chattels has completely destroyed them, the owner may maintain trover for such conversion even though he was not at the time entitled to possession.³ And in many cases it is said that since title draws with it the right of possession, proof of such title established *prima facie* a right to maintain trover.⁴

§ 445. **Possession without Title.** — The authorities have promulgated the general doctrine that a party having the possession or the right to the immediate possession of chattels may maintain trover for a conversion thereof regardless of where the general title may be. Or, otherwise said, possession, being *prima facie* evidence of title, will be sufficient to enable one to maintain trover against one wrongfully converting the property, or against one who can show no better evidence of title.⁵ "It is a leading principle that bare possession constitutes sufficient title to enable the party enjoying it to obtain a legal remedy against a wrong-doer; and, accordingly,

¹ *Movers v. Wait*, 3 Wend. 104, 20 A. D. 667; *Sands v. Pfeiffer*, 10 Cal. 258; *Mauldin v. Clark*, 79 Cal. 51, 21 Pac. 361; *Brooks v. Rogers*, 101 Ala. 111, 13 So. 386.

² *Wilson v. Hoffman*, 93 Mich. 72, 52 N. W. 1037, 32 A. S. R. 485; *Leland v. Tousey*, 6 Hill 328; *Van Brunk v. Schenck*, 11 Johns. 377.

³ *Cox v. Patten*, (Tex. Civ. App.), 66 S. W. 64.

⁴ *Van Houten v. Pye*, 87 Hun 19, 33 N. Y. Supp. 838; *Powers v. Hatter*, 152 Ala. 636, 44 So. 859; *Collins v. Bowen*, 8 Blackf. 262; *Diamond v. McDowell*, 7 Watts (Pa.) 510.

⁵ *Cook v. Patterson*, 35 Ala. 102; *O'Brien v. Hilburn*, 22 Tex. 616; *Gilson v. Wood*, 20 Ill. 37; *Carter v. Bennett*, 4 Fla. 283; *Vining v. Baker*, 53 Me. 544; *Stitt v. Naman Lumber Co.*, 95 Minn. 91, 103 N. W. 707; *Rochester Lumber Co. v. Locke*, 72 N. H. 22, 54 Atl. 705; *Col. Bank v. Am. Surety Co.*, 178 N. Y. 628, 71 N. E. 1129.

it is held that a bailee without interest has a title arising simply from his possession sufficient to maintain trover against one who wrongfully invades that possession.”¹ Thus, a purchaser of goods under execution, even though the sale was void, who has taken possession, may use such prior possession as a basis to sustain trover against a stranger.² And a vendee of goods, under an executory contract of sale, even though he never obtained possession, is yet entitled to immediate possession, and on such right may predicate an action of trover against a stranger who carries the goods away.³ So, one who has delivered chattels to a commission man for sale may maintain trover against an officer who seizes the property as that of the merchant; the ground of decision being that the owner has the right to retake the goods at any time before they are sold.⁴

§ 446. **Illustrations of Same Subject.** — A frequent illustration of the general rule is found in cases of levies by officers under executions or writs of attachment. In such cases, the officer's interest is purely one of possession. Without such possession, either actual or constructive, he has no rights in the property; but by reason of his possession, the law gives him his action for any wrongful interference therewith. Thus, in an action of trover by an officer who had seized under execution certain chattels belonging to one of the defendants, the court, after stating that the plaintiff claimed no other possession than that of sheriff, said: “There is no doubt that a levy upon personal property gives to the sheriff such a possession as enables him to maintain trover for its conversion while in his possession. Nor do we doubt that if he has made a proper levy, but permits the property to remain with the defendant in the execution, or any other, on a verbal understanding to have it forthcoming on the day of sale, his possession continues so as to entitle him to the action against the bailee or any others who may convert it to their own use, and thus prevent him from subjecting it according to law to the satisfaction of the execution.”⁵

§ 447. **Same Subject; Action by Receiptor.** — There have been contrary views expressed by the courts as to whether a third person to whom an officer delivers for safe keeping property which has been

¹ *Harrington v. King*, 121 Mass. 269; *Shaw v. Kaler*, 106 Mass. 448.

² *Duncan v. Spear*, 11 Wend. 54.

³ *Burt v. Dutcher*, 34 N. Y. 493.

⁴ *Jones v. Sinclair*, 2 N. H. 319, 9 A. D. 75.

⁵ *Williams v. Herndon*, 12 B. Mon. (Ky.) 484, 54 A. D. 551; to the same effect, see *Lockwood v. Bull*, 1 Cow. (N. Y.) 322, 13 A. D. 539; *Badlam v. Tucker*, 1 Pick. 389, 11 A. D. 202; *Dezell v. O'Dell*, 3 Hill (N. Y.) 215, 38 A. D. 628; *Brewster v. Vail*, 1 Spencer (N. J.) 56, 38 A. D. 547; *Weatherby v. Covington*, 3 Strob. (S. C.) 27, 49 A. D. 623.

seized by him, has the right to maintain trover for a conversion while the property is in his possession. By some authorities it is said that a receiptor is merely the servant of the officer, has but a mere naked possession without any legal interest, and that therefore he cannot maintain an action against any one who shall take the goods from his possession.¹ But perhaps a greater number of authorities and, I believe, the better reasoning support the doctrine that such receiptor may maintain the action. While it is the consensus of the decisions that one in possession of property merely as the servant of the owner cannot maintain trover, yet the distinction between such a relation and that of a receiptor is based upon the obligation which each assumes to his principal. If one has assumed a liability for the value of the chattels, or a responsibility for the goods placed in his possession, then he has such an interest as will entitle him to bring trover for a conversion. But a mere servant, having possession for his master, is not burdened with the duty of safe keeping, and therefore he cannot maintain the action. This view has been thus expressed: "A mere servant has not a special property in goods. Thus, where a servant was employed in a shop, merely to sell goods, he was held not to have a special property in them. Nor has a shepherd who is employed to tend sheep, any property in the sheep. The reason is, because the law considers the goods and the sheep as much in the actual possession of the owner as if the servant were not with them, and the servant is not responsible for them, if the goods or sheep are taken away by a stranger, it is no injury to the servant, because he has no interest in the possession. But if a servant undertakes specifically to be accountable for goods committed to his custody, he at once exchanges the character of mere servant for that of a bailee, and has a special property."²

§ 448. **Action by Possessor against True Owner.** — A modification of the general rule is applied in cases where the contest is between one in possession and the true owner or one claiming under him.³ Thus, it is said: "The action of trover, founded upon the plaintiff's possession, can only be defeated when the true owner is known, so that the defendant, by satisfying the judgment, would not become

¹ *Ludden v. Leavitt*, 9 Mass. 104, 6 A. D. 45; *Commonwealth v. Morse*, 14 Mass. 217; *Barker v. Miller*, 6 Johns. 196.

² *Poole v. Symonds*, 1 N. H. 289, 8 A. D. 71. See, also, *Thayer v. Hutchinson*, 13 Vt. 504, 37 A. D. 607, where the authorities on both sides of this question are well considered. *Mitchell v. Railway Co.*, 111 Ga. 760, 36 S. E. 971, 51 L. R. A. 622; *Daniels v. Ball*, 11 Wend. 58; *Hyde v. Noble*, 13 N. H. 494. But see *Laspeyre v. McFarland*, 4 N. C. 620, 7 A. D. 705.

³ *McEchron v. Martine*, 111 N. Y. App. Div. 805, 97 N. Y. Supp. 951; *Adelberg v. Horowitz*, 32 N. Y. App. Div. 408, 52 N. Y. Supp. 1125.

the owner of the chattel by a judicial transfer, but would be exposed to a second action in respect to the chattel itself. A mere possibility that the owner may afterwards be discovered will not defeat the action.”¹

§ 449. **Constructive Possession; when Sufficient.** — Among the authorities holding that possession, as against a wrong-doer, or one not showing a better right, is a sufficient basis for an action of trover, it is held that there need not be an actual possession, but there may be what is termed a constructive possession which will suffice.²

¹ *Branch v. Morrison*, 5 Jones L. 16, 69 A. D. 771; 6 Jones L. 17; *Gillespie v. Chastain*, 57 Ga. 218; 26 Am. & Eng. Enc. L. p. 748; *Harpes v. Harpes*, 62 Ga. 394.

² *Ames v. Palmer*, 42 Me. 197; *Scribner v. Master*, 11 Cal. 303; *McCoy v. Herbert*, 9 Leigh 548, 33 A. D. 256; 1 Addison, Torts, 453; *Winship v. Neal*, 10 Gray 382; *Drake v. Reddington*, 9 N. H. 243; *Terwilliger v. Wheeler*, 35 Barb. 620; *Clements v. Yturria*, 81 N. Y. 285.

CHAPTER IX

PLEADING

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| § 450. General principles. | § 479. Joinder of buyer and seller. |
| § 451. Same subject. | § 480. Suit against husband and wife. |
| § 452. Trover joined with other counts. | § 481. Effect of mis-joinder. |
| § 453. Election of remedies by plaintiff. | § 482. Limitation of time to sue. |
| § 454. Same subject. | § 483. Same subject. |
| § 455. How far forms of action retained. | § 484. Whether knowledge necessary to start statute. |
| § 456. Jurisdiction of state courts. | § 485. Same subject. |
| § 457. Same subject; where conversion in another state. | § 486. Same subject. |
| § 458. Same subject. | § 487. Complaint, petition or declaration; general theory. |
| § 459. Same subject. | § 488. Criticism of rule recognizing forms of action. |
| § 460. Jurisdiction of justices courts. | § 489. How far forms of action retained. |
| § 461. Same subject. | § 490. Title and possession of plaintiff. |
| § 462. Jurisdiction of federal courts. | § 491. Whether necessary to allege details of title. |
| § 463. Same subject. | § 492. Alleging ownership and possession at time of conversion. |
| § 464. Where federal courts have exclusive jurisdiction. | § 493. Illustrations of same subject. |
| § 465. Jurisdiction dependent on amount involved. | § 494. Description of the property. |
| § 466. Same subject; amount must appear from complaint. | § 495. What description sufficient. |
| § 467. Venue. | § 496. Same subject. |
| § 468. Parties; general principles. | § 497. Description must be reasonably certain. |
| § 469. Plaintiff; assignee of cause of action. | § 498. Description contained in schedule. |
| § 470. Same subject: rule at common law. | § 499. Value of property and damages. |
| § 471. Suit in name of real party in interest. | § 500. Sufficient allegation of value. |
| § 472. Joinder of plaintiffs. | § 501. Allegation of special damage. |
| § 473. Same subject. | § 502. Allegation of acts constituting conversion; in general. |
| § 474. Suit by surviving partners. | § 503. Alleging conversion by defendant. |
| § 475. Illustrations of same subject. | |
| § 476. Joinder of defendants. | |
| § 477. Same subject; must be community of interest. | |
| § 478. Illustrations of same subject. | |

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| <p>§ 504. Illustrations of same subject.
 § 505. Alleging manner of conversion.
 § 506. Illustrations of same subject.
 § 507. Alleging details of conversion.
 § 508. Whether fraud should be alleged.
 § 509. Where malice is claimed.
 § 510. Wrongful taking by defendant.
 § 511. Conditions precedent to action.
 § 512. Demand and refusal.
 § 513. Same subject.
 § 514. Same subject.
 § 515. Same subject.
 § 516. Allegation of demand and refusal must be direct.
 § 517. Where failure to allege demand is waived.
 § 518. Time of conversion.
 § 519. Joinder of causes of action.
 § 520. Illustrations of same subject.
 § 521. Same subject.
 § 522. Splitting of actions.
 § 523. Amendments of complaints.
 § 524. Amendments allowable.
 § 525. Same subject.
 § 526. Demurrer.
 § 527. Answer; general denial.
 § 528. Same subject.
 § 529. Same subject.
 § 530. Illustrations under general denial.
 § 531. What admitted by general denial.</p> | <p>§ 532. Attacking plaintiff's ownership or right of possession.
 § 533. Same subject.
 § 534. Denial of act of conversion.
 § 535. Same subject.
 § 536. Value and damages.
 § 537. Same subject.
 § 538. Special defenses; general rules.
 § 539. Special plea must confess and avoid.
 § 540. Plea of justification.
 § 541. Same subject.
 § 542. Doctrine requiring justification to be pleaded.
 § 543. Plea of waiver, estoppel or ratification.
 § 544. Same subject.
 § 545. Same subject.
 § 546. <i>Res adjudicata</i>.
 § 547. Set-off or counter-claim.
 § 548. Same subject.
 § 549. Same subject.
 § 550. Matters in mitigation of damages.
 § 551. Same subject.
 § 552. Matters in justification.
 § 553. Statute of limitations.
 § 554. Admissions.
 § 555. Amendments.
 § 556. Reply.
 § 557. Reply must meet whole answer.
 § 558. Reply must be consistent with complaint.</p> |
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§ 450. **General Principles.**—So excellent and condensed a history of the nature and later development of the action of trover as a common law remedy has been presented by R. Ross Perry in a volume first published in 1897, under the title of "Common-Law Pleading",¹ that I deem it well worth while to here quote somewhat at length from it as a proper premise to a discussion of the present-day methods of taking advantage of this remedy. The author says: "It was as desirable to devise some action in the room of *detinue* as it had been to substitute one for debt, since the wager of law was a legal method of defense in both, and in *detinue* even greater exactness and definiteness of description were required than in debt. According to Reeve's History of English Law this action was split off from the action on the case in the 33d and 34th years of the reign

¹ Pages 90, *et seq.*

of Henry VIII (1542-3).¹ But it appears that it did not receive its precise form until the fourth year of Edward VI (1551). At this time 'a writ had been framed which surmised that the plaintiff, being possessed of the thing in question, lost it; and that the defendant found it and converted it to his own use, upon which the action accrued. This, from the suggestion which gave the cue to the demand, was called an action *sur trover et conversion*, or an action of trover; that is, grounded upon the supposed *trover* (finding) by the defendant of the thing demanded, and converting it to his own use.'² By a fiction of law, actions were at length permitted to be brought against any person who had in his possession, no matter how that possession was acquired, the personal property of another, and who sold or used that property without the consent of the owner, and who refused to deliver it upon demand to such owner. The injury lies in the conversion of the plaintiff's property and the depriving him of its use, which is the gist of the action; the allegation of the finding or trover is immaterial and not traversable; the fact of conversion does not necessarily import an acquisition of property by the defendant; the action is brought for the recovery of damages to the value of the thing converted and not for the thing itself, which can only be recovered, if at all, in *detinue* or *replevin*.

§ 451. **Same Subject.** — "Lord Mansfield thus described this action: 'In *form* it is a fiction; in *substance* it is a remedy to recover the value of personal chattels wrongfully converted by another to his own use; the form supposes that the defendant might have come lawfully by it, and if he did not, yet by bringing this action the plaintiff waives the trespass; no damages are recoverable for the act of taking; all must be for the act of converting. This is the tort or *maleficium* (misdeed) and to entitle the plaintiff to recover two things are necessary: 1st, property in the plaintiff; 2nd, a wrongful conversion by the defendant.'³ Trover⁴ lies only for the conversion of some personal chattel and not for injuries to real property. It is sustainable only for specific articles, but those articles need not be described with certainty, because only damages for the conversion, and not the thing itself, are recovered in the action. . . .

§ 452. **Trover Joined with Other Counts.** — "Where it is doubtful whether the evidence will establish a conversion so as to support a count in trover, a count in case for negligence, etc., should be added, if there be any proof to sustain it. If there has been a conversion,

¹ Reeves' History, IV, 385 (2d Lond. ed.).

² *Id.* 526.

³ Cooper *et al. v. Chitty et al.*, 1 Burr 31.

⁴ Chit. Pleading, 135, 145.

trover lies, although the goods be afterward restored to the owner, for the restoration only goes in mitigation of damages.¹ . . . For a wrongful taking, trover may be brought concurrently with trespass; but trover may often be brought where trespass will not lie, for trespass cannot be brought where the taking was lawful or excusable; yet in such cases trover may be maintained for the unlawful conversion.² The declaration in this action should state that the plaintiff was possessed of the goods in question as of his own property, and that they came to the defendant's possession by finding; but the omission of the formal words is not material after verdict, and these words are not traversable. As the conversion is the gist of the action, it must necessarily be stated in the declaration. The judgment is for damages and full costs and the damages should be laid large enough to cover the value of the goods and the loss through their detention."³

§ 453. **Election of Remedies by Plaintiff.** — As will more fully appear in a subsequent chapter,⁴ a plaintiff who has been wrongfully deprived of his chattels or their possession has an election of remedies for the wrong done, each of which remedies has its distinguishing features even under the modern or code system of pleading. Thus, a party claiming the right of ownership in and of immediate possession to personal property, and seeking to enforce such right, may bring replevin or detinue, or, if he elects, he may abandon the property to his adversary and sue in trover. In trover, however, it is not the property nor its possession which he seeks, but damages sufficient to cover its value, while in replevin or detinue it is primarily the property which he is pursuing, and he takes a judgment for its value only in the absence of ability to secure the specific articles claimed. Hence, the distinctive difference between the two proceedings helpful in determining the rule in either is that in the one it is money in lieu of property which is sought, and in the other it is possession of specific personal property and not money which is the object of the action.⁵ In the action of trover, the plaintiff does not seek to recover his property, but its value as a substitute for the property. He abandons the property to the defendant, preferring to pursue him for its value. He makes a kind of forced sale of it, without any expectation or intention of retaking it.⁶

¹ Chit. Pleading, 144.

² *Id.*

³ *Id.*, 145.

⁴ Post, Chap. X, WAIVER OF CONVERSION.

⁵ Leeper, etc. Co. v. First Nat'l. Bank (Okla.), 110 Pac. 655.

⁶ Allen v. Fox, 51 N. Y. 562, 10 A. R. 641.

§ 454. **Same Subject.** — So, the right may exist in plaintiff to pursue trover or an action on contract;¹ trover or claim and delivery;² trover or case;³ and in any action the courts are not disposed to look too closely into the nice distinctions between trover and trespass, or detinue, or case, in order to judge of the sufficiency of a complaint in stating a cause of action, but will merely decide whether the facts as stated are sufficient upon which to grant relief.⁴ One court, in using the following language in passing upon an objection to a complaint for failing to show what form of remedy the pleader had intended to adopt, has enlarged upon this idea: "It is contended on the part of the respondent that it is impossible to tell from reading the complaint whether the action is for conversion or is based upon a breach of warranty of title. It may readily be agreed that the complaint is somewhat indefinite and uncertain; but we do not feel that we can say on that account that it does not state facts sufficient to constitute a cause of action. As has heretofore been intimated by this court, we are satisfied that a complaint may be so ambiguous, unintelligible and uncertain as to fail to set forth plaintiff's cause of action in ordinary and concise language.⁵ But this case does not appear to fall within this rule. . . . We are operating under the modern reformed system of practice and pleading, and the days when hearings upon the merits may be avoided by the interpolation of technicalities have fortunately gone by. The only thing that is enjoined upon a plaintiff under our code is that he shall state the facts constituting his cause of action in ordinary and concise language."⁶ This is in harmony with the general rule that "the court may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issue."⁷

§ 455. **How Far Forms of Action Retained.** — While forms of action have been abolished by the codes, yet where the averments of fact in a complaint show the case to be one for which a particular form of action would have been a proper one at common law, then the general principles of pleading and practice apply to it which apply to the special form of common law action.⁸ So, even in the code states the principles of the common law action of trover are recognized, and the pleadings should contain all the material allegations

¹ *Yardum v. Wolf*, 33 N. Y. App. Div. 247.

² *Howard v. Barton*, 28 Minn. 116.

³ *Wilkinson v. Moseley*, 30 Ala. 562.

⁴ *Tipton v. Burton*, 58 Mo. 435.

⁵ Citing *Lynch v. Great No. Ry. Co.*, 38 Mont. 511, 100 Pac. 616.

⁶ *Carpenter v. Nelson*, 109 Pac. 857 (Mont.).

⁷ *Dennison v. Chapman*, 105 Cal. 447, 39 Pac. 61.

⁸ *Faulkner v. First Nat'l Bank*, 130 Cal. 258, 62 Pac. 463.

which were necessary before the day of the code.¹ But where the necessary allegations are made it is not fatal that improper relief is prayed for, since it is said that "A court, in granting the relief to which a pleader may be entitled, is not governed alone by the prayer, but should grant any relief which the statement of facts in the pleading may show the pleader entitled to receive."²

§ 456. **Jurisdiction of State Courts.**—As in the case of other remedies, it is elementary that the action of trover must be brought in a court which has jurisdiction of the subject-matter and of the parties.³ The question of jurisdiction in the action is to be determined by the principles governing other actions of a transitory nature—for it seems to be universally agreed that the action of trover is transitory and may be maintained, generally, wherever jurisdiction of the parties may be obtained.⁴ This is true because the possession or custody of specific personal property is not involved in the action, being *in personam* for the recovery of a money judgment for the value of the chattels; so, while the action is one inherently at law, it may be maintained though the goods may be reposing in the custody of a court of chancery.⁵

§ 457. **Same Subject; Where Conversion in Another State.**—The nature of the action of trover permits state courts to take jurisdiction even though the act complained of was committed within the boundaries of another state; so that the criterion is whether the particular court would have jurisdiction had the conversion occurred within the state creating the court.⁶ This doctrine does not obtain universally, for the theory has been adopted that, while the court may assume jurisdiction, yet it must determine whether a right of action existed in the state where the act was committed. Thus, in an interesting case from the Kansas court⁷ an action of trover for the conversion of corn and corn-stalks was brought by the plaintiff, a resident of Kansas, against the defendant, a resident of Indian Territory, the latter place being where the conversion was alleged to have occurred. The opinion of the court, in denying jurisdiction of the trial court, states: "It is contended by the plaintiff-in-error

¹ Siegel-Campion Co. v. Holly, 44 Col. 580, 101 Pac. 68; Citizens Bank v. Tiger Tail Mill Co., 152 Mo. 145.

² C. E. Sharp Lumber Co. v. Kan. Ice Co., — Okla. —, 142 Pac. 1016.

³ Robinson v. Peru Plow Co., 1 Okla. 140, 31 Pac. 988.

⁴ Robinson v. Armstrong, 34 Me. 145; Gould, Pleading, Chap. 3; Chitty, Pleading, 269.

⁵ Garabaldi v. Wright, 52 Ark. 416, 12 S. W. 875.

⁶ Liles v. Woods, 58 Tex. 416; Hoy v. Smith, 49 Barb. 360; Dennis v. Strunk, 32 Ky. L. R. 1230, 108 S. W. 957; Kryn v. Kahn, (Sup. 1903) 54 Atl. 870, — N. J. —.

⁷ Holderman v. Pond, 45 Kan. 410, 25 Pac. 872, 11 L. R. A. 542.

that at the time of the alleged wrong no jurisdiction had been accorded any court outside the limits of that country, unless one of the parties be an inhabitant of that country, and the other an inhabitant outside thereof, either as plaintiff or defendant, and, in that case, exclusive original jurisdiction was then given to the nearest United States District Court; that an action of such a character as this cannot be maintained in this state. Laying aside the question of the right of the plaintiff below to waive the tort and recover as upon an implied contract, which seems to be well settled upon reason and authority, can the courts of this jurisdiction give the plaintiff below a remedy for a wrong committed in the Indian Territory when there is a question as to whether there was a remedy there? The primary right of the plaintiff below to recover rested upon a tort committed where the remedy was confined to the nearest United States District Court, which had exclusive original jurisdiction. Could the plaintiff below 'upon the theory of the implied promise and its infraction' recover in this jurisdiction for a wrong committed where the jurisdiction is restricted to the federal court, if indeed any remedy existed at all? We think the tort charged, and the right and remedy growing out of such tort, must be determined by the law of the Territory where the wrong was committed. . . . In order to maintain an action founded upon an injury to person or property, the act which is the cause of the injury or damage, and the foundation of the action, must be actionable or punishable at least by the law of the place where the injury was done.¹ . . . As the plaintiff below had no permit or license to lease the land where the corn was raised, and there being grave doubts whether he had any right to recover for the alleged conversion of this property in the Indian Territory where the tort was committed and, if such right did exist, the jurisdiction was vested in another court—we think it follows from such a state of facts that the trial court had no jurisdiction."

§ 458. **Same Subject.**—Again, the jurisdiction of courts of one state over rights of action originating in another state has been in a measure denied by Judge Story,² the correctness of whose position has been thus doubted by the Colorado court in a case in which trover had been brought against an executrix who was alleged to have converted certain assets of the estate and brought them into

¹ Cooley, Torts, 471; Wharton, Const. of Laws, Art. 478; *Holland v. Peck* (Tenn.), 151; *Le Forest v. Tolman*, 117 Mass. 109; *Smith v. Condry*, 42 U. S. 1 How. 28, 11 L. Ed. 35; *McLeod v. Conn. etc. Ry. Co.*, 58 Vt. 727; *Carter v. Goode*, 50 Ark. 155; *Gordon v. U. S.*, 74 U. S. (7 Wall.) 193, 19 L. Ed. 35.

² *Conflict of Laws*, § 514b.

the state of Colorado:¹ "The general doctrine is that executors and administrators are not liable to actions as such in a state where they have obtained no letters of administration, but that they are amenable for their executorial acts only to the proper tribunals of the state from which they obtained their appointment. The appellant insists that this doctrine applies to this case and that the court is wholly without jurisdiction of the subject-matter. The general rule for which the appellant contends is sustained by a large number of authorities. If this action were against the defendant in her capacity as executrix to enforce the performance of her official duty, it would not lie. Appellant misconceives the real scope of the action. . . . In his valuable work on the Conflict of Laws, at section 514b, Judge Story declares that the doctrine is fully established that, if a foreign executor or administrator brings or transmits to another state property which he has received under administration abroad, or if he is personally present, he is not, either personally or in his representative capacity, liable to a suit in such other state. Several cases are cited in its support. Notwithstanding this opinion of the learned jurist, we think the principle upon which the jurisdiction of the court in this case rests has been firmly established by many respectable authorities."²

§ 459. **Same Subject.** — In a leading case upon the subject under discussion it was alleged that certain logs had been cut by defendant upon land located in a state other than that in which redress was sought. The answer of the defendant alleged that he cut the logs under a license, which answer the court held did not present a question of title to real estate; and upon objection by the defendant that the court had no jurisdiction over the cause of action originating in another state, the court held the action transitory and, therefore, maintainable in the court obtaining jurisdiction of the parties.³ The same ruling was made where action was brought for the value of ore wrongfully taken by the defendant from land in another state and converted to his own use.⁴

§ 460. **Jurisdiction of Justices Courts.** — Whether or not the court of a justice of the peace has jurisdiction at all to try actions of trover for the conversion of chattels depends largely upon constitu-

¹ *Falke v. Terry et al.*, 32 Col. 85, 75 Pac. 425.

² Citing: *Turnstall v. Pollard's Admr.*, 11 Leigh (Va.) 1; *Hedenberg v. Hedenberg*, 46 Conn. 30, 33 A. R. 10; *McNamara v. Dyer*, 7 Paige 239, 32 A. D. 627; *Montalvan v. Clover*, 32 Barb. 190; *Patton v. Overton*, 27 Tenn. 192; *Colbert v. Daniel*, 32 Ala. 314; *McCabe v. Lewis*, 76 Mo. 296; 8 Enc. Pl. & Pr. 714; *Schouler's Ex. & Admr.* 173; 1 *Woerner's Am. L. of Admrs.* 164.

³ *Tyson v. McGuineas*, 25 Wis. 656; *Whidden v. Seelye*, 40 Me. 247, 63 A. D. 661.

⁴ *Hoy v. Smith*, 49 Barb. 360.

tional or statutory provisions and the construction to be placed upon these. It has been said, however, that justices courts have had jurisdiction of a class of cases known as trespass or trover for a limited amount since the organization of the government, and the mere form of action does not affect their jurisdiction.¹ An early Georgia case² held that a justice of the peace had jurisdiction to try an action of trover. The court of the same state later, however, construing a constitutional provision relative to justices courts, held that no jurisdiction was given over such action. The constitution provided: "Justices of the peace shall have jurisdiction in all civil cases arising *ex contractu*, and in case of injuries or damages to personal property, when the principal sum does not exceed over one hundred dollars." The court said, in passing upon the question:³ "Obviously such an action is not a case arising *ex contractu*, but it is an action *ex delicto*, founded upon a tort committed by a direct invasion of the owner's legal right to the possession and use of his chattels. It is based upon the title of the plaintiff to the property sued for and upon the wrongful conversion thereof by the defendant, and is, strictly speaking, an action *ex delicto*. We think it is equally clear that such a suit cannot properly be classified among 'cases of injuries or damages to personal property.' The words 'injuries or damages' were evidently intended to be synonymous and, when applied to property, they mean some physical injury to the property itself — some trespass upon it — by virtue of which its value has become diminished or destroyed. Conversion implies no such injury. An action of trover, therefore, has no reference to any injury or damage which the property itself may have sustained."

§ 461. **Same Subject.** — A different conclusion has been reached by the Arkansas court, with apparently better reasoning. Under a constitutional provision that justices courts should have jurisdiction in all matters pertaining to damages to personal property where the amount did not exceed \$100, the court held that this clause means all injuries which one may sustain in respect to his ownership of personal property, and includes damages for a conversion.⁴ And the Missouri court, under a statute giving justices of the peace jurisdiction in trespass or case for injury to person or property, has held that

¹ Crouse v. Walrath, 41 How. Pr. 86.

² James v. Smith, 62 Ga. 345.

³ Blocker v. Boswell, 109 Ga. 230, 34 S. E. 290 followed in Watson v. Pearre, 110 Ga. 320, 35 S. E. 316, and in Jordan v. Glover, 111 Ga. 806, 35 S. E. 667; So. Ry. Co. v. Steel Co., 122 Ga. 658, 50 S. E. 488.

⁴ Parker v. Webb, 48 Ark. 293, 3 S. W. 521; St. Louis, etc. Co. v. Briggs, 47 Ark. 59, 14 S. W. 464.

such provision includes jurisdiction in trover.¹ It seems to me that the Georgia court has placed too strained a construction upon the constitutional provision of the state. It does not occur to me what good reason there could be in saying that the words "damage to personal property" must mean some physical change in the property itself so that it is either destroyed or lessened in value. So far as the owner is concerned the damage may be as great by his inability to secure possession as it would be had the property been actually destroyed. And if the words "injury and damage" were used as synonyms, why were they used together, in the same connection, in the Georgia constitution?

§ 462. **Jurisdiction of Federal Courts.**—In some instances of conversion of chattels, state and federal courts have concurrent jurisdiction, and, contrary to what at first thought might seem to be the rule, such concurrent jurisdiction may exist in matters wherein is involved a statute of the United States or some regulation or rule thereunder. Thus, in one case of interest,² trover was brought in a state court against a postmaster who, acting under color of the federal statutes and the regulations of the postoffice department, detained a newspaper the addressee of which refused to pay letter-rate postage. The contention in behalf of the postmaster was that if the plaintiff had any cause of action against him it could not be maintained in the forum of the state but that exclusive jurisdiction in such cases was vested in the federal courts. The judge delivering the opinion of the state court, in passing upon this contention, said: "I will not contend that Congress may not make the jurisdiction of the federal courts exclusive in cases affecting ambassadors, other public ministers and consuls; or in cases of admiralty and maritime jurisdiction, or in cases growing out of, and peculiar to the federal constitution, and where the remedy is exclusively given by an act of the national legislature. In the latter cases, Congress may unquestionably provide that the remedy specifically given shall be pursued and enforced in the federal courts solely. But in many cases where the law of the Union prescribes the remedy, the power to pursue and enforce it in the state courts is expressly given by Congress. In cases where this has not been done, and there is no exclusive grant of jurisdiction to the federal courts, if the state courts are so organized as to afford redress, it may be obtained therein. I think that it is strictly true that in all civil cases where the common

¹ *Smith v. Grove*, 21 Mo. 51. See, also, *Alley v. Gamlick*, 55 Mo. 518; *Porter v. Duncan*, 23 Pa. Super. Ct. 58.

² *Teall v. Felton*, 1 N. Y. 537, 49 A. D. 352, affirmed in 12 How. (N. S.) 284.

law affords redress, the party injured may seek it in a state tribunal, proceeding according to the common law, and having jurisdiction of the person of the defendant, though he may be an officer of the federal government, and affect to act under a law of the Union. . . . This remedy for a tortious conversion has always been complete in the state courts. It does not follow that because the defendant may have been acting under a law of Congress, in withholding the newspaper, and consequently may defend himself against the alleged conversion, that jurisdiction of the subject-matter is exclusively given or acquired by the federal courts under such law."

§ 463. **Same Subject.** — In another case of trover where exclusive jurisdiction of the federal courts was claimed, the facts were that a United States marshal was suing to recover for a conversion of personal property which he claimed by reason of a levy made by him under an execution issued out of the Circuit Court.¹ In sustaining its jurisdiction, the state court said: "The court which issued the execution under which this levy was claimed to have been made, was a court of the United States, but the officer is suing in a state court as an individual, and he must show that court that the writ, under which he justifies or claims property, was properly issued by that court and that he made a valid levy under it. It would be strange indeed if such questions could not be heard or determined by the state court without the hazard of a clash of jurisdictions or the charge of usurpation of power."

§ 464. **Where Federal Courts have Exclusive Jurisdiction.** — Again, while it has been said that the federal courts have exclusive jurisdiction of all matters involved in or by a proceeding in bankruptcy, and that therefore an action of trover by an assignee should be brought in a court of the United States,² yet on principle there should be no distinction between such a case and any other action of trover where there is in any way involved a statute of the federal government or a rule or regulation of any of its departments. Accordingly, the better rule is that state courts will take cognizance of actions by an assignee in bankruptcy to recover property disposed of by the bankrupt in fraud of the bankrupt act.³

§ 465. **Jurisdiction Dependent on Amount Involved.** — Jurisdiction of courts is in some instances made to depend upon the amount in controversy; and the amount may be a minimum below which jurisdiction is not conferred, or it may be a maximum above which

¹ Davidson v. Waldron, 31 Ill. 120, 83 A. D. 206.

² Dodd v. Hammock, 59 Ga. 403.

³ Gilbert v. Priest, 8 Nat'l. Bank Reg. 160.

the court cannot take cognizance of the action. In either event plaintiff, for a conversion of his chattels, must bring his case in the court the jurisdiction of which extends to the amount which he claims as his damages. Thus, where it appeared from the allegations of the complaint that the greatest amount plaintiff could recover would be insufficient to confer upon the court authority to proceed in the case, it was held that the action should be dismissed on motion for want of jurisdiction, even though the amount laid as damages would confer jurisdiction.¹

§ 466. **Same Subject; Amount must appear from Complaint.** — As stated, it is the general rule that the amount in controversy upon which jurisdiction is determined must appear by the allegations of the complaint, declaration or petition, unless it should be made to appear by proper pleadings that the claim is not made in good faith but fraudulently for the sole purpose of conferring jurisdiction where there would properly be none. Thus, where the actual damages claimed were insufficient to bring the case within the jurisdiction of the District Court, it was held that since an additional sum was asked in the prayer of the petition by way of punitive damages, this claim was sufficient to give jurisdiction, it appearing from the plaintiff's allegations that such punitive damages were proper items of recovery.² One case explains the rule thus: "The amount involved in an action *ex delicto* is the sum demanded or sought to be recovered in plaintiff's petition, and not the amount recovered."³ In the original petition filed in this cause, the sum demanded was within the jurisdiction of the court in which the action was instituted, and within the jurisdiction of the court to which the case was transferred; but this petition was abandoned and an amended petition filed, which, while setting up in the main the same cause of action, seeks to recover the sum of \$1101.25 which is in excess of the jurisdiction both of the court in which the amended petition was filed and the court to which the cause was transferred and tried. In order to determine the amount in controversy and the jurisdiction of the trial court, we must look to the pleadings,⁴ and if the amount of the damages claimed by plaintiff is in excess of a maximum jurisdictional limit prescribed by statute or the constitution, the court cannot proceed.⁵ It is a well settled rule that where the plaintiff

¹ Hannon v. Bramley, 65 Conn. 193.

² Alderson v. Gulf, etc. Ry., 23 S. W. 617 (Tex. Civ. App.).

³ 1 Enc. Pl. & Pr. 702.

⁴ Farmers & M. Bank v. Nat'l Bank, — Okla. —, 105 Pac. 641.

⁵ Thompson v. Willard, 66 Ark. 346, 50 S. W. 870; Little Rock etc. Co. v. Manees, 44 Ark. 100; Wiley v. Sinkler, 179 U. S. 58, 21 Sup. Ct. 17, 45 L. Ed. 84.

claims more than the jurisdictional maximum, but recovers less, the court may within its sound discretion, decide whether his claim for an amount in excess of the jurisdictional maximum was fraudulent and done to evade the law or was made in good faith, but in such investigation no presumption of bad faith prevails; and, in the absence of a showing by the defendant to that effect, the court is held to be clothed with jurisdiction."¹ But it has been held that if the plaintiff in good faith presents a claim within the jurisdictional limit of the court, and the jury finds for him in an amount below such limit, the verdict does not thereby divest the court of jurisdiction.² Where there was a statute giving to justices of the peace jurisdiction in all actions for injuries to persons or to personal or real property where the damages claimed did not exceed \$50, it was held that there was no jurisdiction for more than this amount in an action of trover and that the plaintiff could not confer jurisdiction by waiving the tort and alleging that he sued in assumpsit.³

§ 467. **Venue.** — Independent of statutory provision, the venue in trover may be laid wherever jurisdiction of the parties may be obtained, since the action is of a transitory character.⁴ But statutory provisions have been made in some states specifying the county within the state in which the action shall be brought; and such provisions of course will govern.⁵ And it has been held that if plaintiff fails to comply with the statute, he cannot, after the evidence is in, submit to a non-suit, and that defendant is entitled to a verdict.⁶ Where a conversion by two is alleged, the action against them is held to be joint, and suit may be brought against both in the county in which either resides.⁷ And it has been held that if the complaint fails to state the county in which the conversion occurred, the defendant is entitled to a change of venue to the county in which he resides, the statute providing that the action shall be tried in such county.⁸

§ 468. **Parties; General Principles.** — The question of who is entitled to maintain trover has been discussed in detail in a previous

¹ *St. Louis etc. Ry. Co. v. Egbert*, — Okla. —, 111 Pac. 202.

² *Sharpe v. Barney*, 114 Ala. 361, citing *Haws v. Morgan*, 59 Ala. 508. See *Curry v. Wilson*, 48 Ala. 638; *Ross v. McGuffin*, 2 Tex. Civ. Cas. 460.

³ *Spencer v. Vance*, 57 Mo. 427; *Gladby v. Prewitt*, 26 Mo. 121; *Sandeen v. Kan. City, etc. Ry. Co.*, 79 Mo. 278.

⁴ *Col. First Nat'l Bank v. Brown*, 85 Tex. 80; *Robinson v. Armstrong*, 34 Me. 145. But see *Brice v. Vanderheyden*, 9 Wend. 472, holding that the action is local as distinguished from transitory.

⁵ *Bird v. Georgia Ry.*, 72 Ga. 656; *Updegraff v. Lessem*, 15 Col. App. 297, 62 Pac. 342.

⁶ *Hull v. Southworth*, 5 Wend. 265.

⁷ *Williamson v. Howell*, 17 Ala. 830.

⁸ *Yore v. Murphy*, 10 Mont. 304, 25 Pac. 1039; *Dunham v. Parmenter*, 74 Hun 559, 26 N. Y. Supp. 955.

chapter of this work.¹ The criterion was there shown to be that he was a proper party plaintiff, as a general rule, who, at the time of the alleged conversion, had the general or special ownership of the property involved, together with either the possession or the right of immediate possession. And the question as to who may be sued in trover has also been exhaustively discussed in a previous chapter² where it was shown to be the rule that he may be sued who either committed the act complained of, or aided or assisted in its commission, which act resulted in depriving the owner of his property.

§ 469. **Plaintiff; Assignee of Cause of Action.** — Whether or not a cause of action for the conversion of chattels is assignable so as to enable the assignee to sue in his own name must be determined according to the statutes of the various states and the construction placed on same by the courts. One case has come to my attention where it was decided that where the property was assigned and afterward converted, the assignee could sue for the conversion; but his character in the suit was that of owner rather than assignee. The case illustrated the principle involved by showing that where a statute prohibited the transferring of title to a promissory note by a separate instrument, yet the plaintiff had nevertheless taken an assignment by a separate instrument and thereby become the equitable owner of the note and had the right to bring trover for its conversion.³ And even where such an assignee may sue, his right may be farther restricted by the character of his assignment. Thus, in one case it was said: "It appears by the cases already cited, that the delivery of a note of hand, or other chose in action, to an assignee, for a valuable consideration, without an assignment in writing, is a valid assignment in equity which courts of law will take notice of and protect. And the assignment of a mortgage of personal property by delivery stands on the same footing and is entitled to the same protection. By such an assignment, however, the legal estate does not pass to the plaintiff, and this action could not be maintained in his own name, before the assignment in writing; yet he might maintain an action for the conversion of the property so equitably assigned in the name of Sibley, which action Sibley would have had no right to discharge."⁴

§ 470. **Same Subject; Rule at Common Law.** — But the rule was at common law that a cause of action for the conversion of chattels

¹ *Ante*, Chap. VII.

² *Ante*, Chap. IV.

³ *Chickering v. Raymond*, 15 Ill. 363.

⁴ *Vrain v. Paine*, 4 Cush. 483, 50 A. D. 807; *Baker v. Seavey*, 163 Mass. 522, 47 A. S. R. 475, and cases cited.

was not assignable so as to enable the assignee to sue in his own name.¹ "At common law no chose in action was negotiable, or even assignable. In equity, every chose in action, except a tort, was assignable; but it was assignable subject to all equities that might be set up against it."² "In determining what causes of action arising from torts are assignable, the same criterion has been adopted as in the case of contracts. If the claim is one which would survive to the personal representatives of the decedent, it is assignable, otherwise not. As a general rule causes of action arising from torts were not assignable at common law; and the same rule prevailed in equity as to merely personal injuries, such as libel, slander and the like, where the effect of the injury did not tend to diminish the value of the estate. Such personal injuries died with the person, and were incapable of assignment. Statutes have been passed in most of the states which increase the number of causes of action which survive, so as to include all injuries to property by which its value has been diminished. As illustrations of such causes of action which survive, and are consequently assignable, may be mentioned claims arising from the negligent use of real or personal property, or for the conversion of the latter."³ "The general rule, both at law and in equity, is that the right of action for a pure tort is not the subject of assignment. This rule has been changed to some extent by statute, and the provisions in reference to what choses in action will survive or abate by the death of either or both of the parties have been held to modify this rule, so that everything which survives and can be transmitted to the executor or administrator of the assignee, in case of death, is assignable."⁴

§ 471. **Suit in Name of Real Party in Interest.** — It has been held that the effect of the provision of the code that all actions shall be brought in the name of the real party in interest is that causes of action for conversion thereby become assignable, and suit may be prosecuted by the assignee in his own name.⁵ So, a sale and transfer of the property carries with it a right of action for a previous conversion; as where a bill of lading for goods shipped was sold and

¹ *Deering v. Austin*, 34 Vt. 330.

² *McCrum v. Corby*, 11 Kan. 464.

³ 1 *Estee's Pl. & Pr.* 335, citing: *Lazard v. Wheeler*, 22 Cal. 139; *Tyson v. McGuineas*, 25 Wis. 656; *Smith v. Kennett*, 18 Mo. 154; *McKee v. Judd*, 12 N. Y. 622, 64 A. D. 515; *Richtmeyer v. Remsen*, 38 N. Y. 206.

⁴ *Kan. Mid. Ry. v. Brehm*, 54 Kan. 755, 39 Pac. 690, cited and approved in *Kan. City, etc. Ry. Co. v. Shutt*, — Okla. —, 104 Pac. 51.

⁵ See *Smith v. Kennett*, 18 Mo. 154; *Whittaker v. Merrill*, 30 Barb. 389; *Smith v. Thompson*, 94 Mich. 381, citing *Final v. Bachus*, 18 Mich. 218; *McKee v. Judd*, 12 N. Y. 622; *Pritchell v. Reynolds*, 21 Mo. App. 674.

assigned, it was held that the transferee had the right to maintain trover for the conversion of the goods covered by the bill of lading.¹ In a Missouri case wherein it was argued that such a cause of action was not assignable, the court said: "The argument fallaciously confounds the form of the action with the nature of the wrong complained of. There is no action of trover in Missouri. Civil action is the remedy for every civil wrong. The assignability or non-assignability of a right of action depends upon no form of action, but upon the character of the wrong for which redress is sought."² It has further been held that where the cause of action has been assigned by plaintiff during the pendency of a suit thereon, the plaintiff's right to recover is not defeated by such assignment, especially where defendant failed until after judgment to make objection or to ask that the assignee be substituted for the original plaintiff. "If the defendants desired the record to show the transfer of interest in order that the satisfaction of the judgment might be clearly conclusive against the real party in interest and operate to transfer the title as against the plaintiff in the record, it was open to them, when the facts were disclosed, to move the court for a substitution of parties."³

§ 472. **Joinder of Plaintiffs.** — All the parties in interest should join as plaintiffs in an action of trover; and, *eo converso*, one who had no interest in the property at the time of the conversion should not be joined as a party plaintiff.⁴ Thus, where it was shown that one of the plaintiffs held merely an interest as a beneficiary in trust, it was held that such party was improperly joined as a plaintiff, and upon a point of practice in the particular case it was further held that objection thereto could not be made by demurrer without specifying such grounds of complaint.⁵ Pursuant to the general rule requiring all parties in interest to join as plaintiffs, it has been held that the conversion of goods owned by a partnership is a tort against all the partners and in an action for such conversion they should join as plaintiffs; and that if there be any good reason why fewer than all of the partners should sue, such reason should be alleged.⁶ But

¹ *Dickson v. Mer. Elev. Co.*, 44 Mo. App. 498; *Mahaney v. Walsh*, 16 N. Y. App. Div. 601; *Birdsall v. Davenport*, 43 Hun 552.

² *Hamlin v. Carruthers*, 19 Mo. App. 567; *Sandeen v. Kan. City Ry. Co.*, 79 Mo. 278; *Shultz v. Christman*, 6 Mo. App. 339; *Watson v. Hoosac, etc. Co.*, 14 Mo. App. 585.

³ *Perkins v. Marrs*, 15 Col. 262.

⁴ *Updegraff v. Lessem*, 15 Col. App. 297, 62 Pac. 342; *Harris v. Brain*, 33 Ill. App. 510.

⁵ *Berney v. Drexel*, 33 Hun 419; *Parker v. Chambers*, 24 Ga. 518; *Whitney v. Stark*, 8 Cal. 514, 68 A. D. 360.

⁶ *Houghton v. Puryear*, 10 Tex. Civ. App. 383; *Kirbs v. Provine*, 78 Tex. 353.

where it appeared that a wife's separate property had been converted, it was held that the husband should not join her as a plaintiff in an action for such conversion.¹

§ 473. **Same Subject.** — It is clearly the rule, established under the new system of pleading, as well as under the old, that all the owners of a chattel, whether partners or not, must join in an action to recover damages for injuries done to it or for a wrongful taking or conversion of it,² or to recover its possession. This rule is so firmly settled that nothing less than an express contract in reference to the chattel in the name of one joint owner, by which promises are made directly to him, will suffice to permit a severance. In such a case, while he may sue alone, in virtue of the express understanding to and with him, yet all the others may, if they so elect, join with him in an action on the contract; for example, a sale of the chattel and a promise to pay the price.³

§ 474. **Suit by Surviving Partners.** — The new procedure has not, in general, changed the former rules as to the rights and powers of surviving partners when one or more of the firm have died. Now, as before, the surviving partner or partners have the exclusive possession of the firm assets for the purpose of paying its debts and settling its affairs. They alone can prosecute all actions of a legal nature to recover debts, or the possession of property, or its value, or damages for its wrongful conversion or mis-use. The remedy on all rights of action held by or due to the firm is to be pursued in their names, and the personal representative of the deceased member cannot be joined in such actions by virtue of any interest which they may have in the proceeds and in the final winding up of the partnership accounts. This doctrine, however, does not mean that every thing in action belonging to a firm at the time of the death of a member must invariably be enforced by the survivor, or not at all; he is simply the proper and only person to sue, as long as the thing in action or other personal property remains a part of the firm assets.⁴

§ 475. **Illustrations of Same Subject.** — A statement of a few more instances in which the question of the joinder of parties plaintiff has arisen will suffice to illustrate the principles stated. Thus, under a statute permitting all persons in interest to join as plaintiffs, it was

¹ Taylor v. Jones, 52 Ala. 78; Pickens v. Oliver, 29 Ala. 528.

² Gock v. Keneda, 29 Barb. 120; Fuller v. Fuller, 5 Hun 595; Reeder v. Sayre, 70 N. Y. 180; Spalding v. Black, 22 Kan. 55; State v. True, 25 Mo. App. 451; Welch v. Sackett, 12 Wis. 243; Hewlett v. Owens, 51 Cal. 570.

³ Pomeroy's Code Remedies, § 140.

⁴ Pomeroy's Code Remedies, § 224.

held that a mortgagor and mortgagee could properly join as plaintiffs in an action for the conversion of the mortgaged chattels.¹ So, where separate mortgagees held concurrent liens, or liens of equal priority, it was held that they might join in an action of trover involving the mortgaged property;² and the same where the mortgagees were in joint possession.³ And a lessor and lessee of a coal mine may join in an action for an injunction and accounting for coal previously converted;⁴ or lessor and lessee of a crop.⁵ The same ruling was made where each of two plaintiffs owned one of the oxen of a team or yoke which had been converted.⁶ But where goods were acquired for a corporation in the name of one of its officers, it was held that he could not sue alone for a conversion without joining the corporation.⁷ And where two officers levied upon personalty under separate writs they could not join as plaintiffs in an action of trover for the conversion of the property.⁸ So, creditors attaching in separate suits cannot be joined in such action.⁹ And one is not a proper party plaintiff when he is interested only in the profits to be deprived from the property, and the title is in another.¹⁰

§ 476. **Joinder of Defendants.** — When two or more persons have joined in the commission of an act which amounts to a conversion of chattels, or have so interfered therewith as to produce the same result, the owner or person having the right of immediate possession may bring trover and join all, or he may sue any one at his election; or, some may be sued jointly and at the same time one can be sued separately; the only limitation being that there shall be but one satisfaction of the entire claim.¹¹ But the act complained of must be sufficient to constitute a conversion on the part of all, and when such is the case the law holds each accountable for the entire damage.¹² “There are no accessories in conversion — all are principals; and every person who knowingly aids or abets another in the conversion of property of a third person renders himself liable to such third

¹ *Geekie v. Kirby Car Co.*, 106 U. S. 379.

² *Hays v. Farwell*, 53 Kan. 78, 35 Pac. 794; *Howard v. Chase*, 104 Mass. 249; *Welch v. Sackett*, 12 Wis. 243.

³ *Trompen v. Yates*, 66 Neb. 525, 92 N. W. 647.

⁴ *United Coal Co. v. Canon City Coal Co.*, 24 Col. 116.

⁵ *Hays v. Crist*, 4 Kan. 350; *Washburn v. Case*, 1 Wash. Ty. 253, holding that one could sue alone.

⁶ *Fuller v. Fuller*, 5 Hun 595.

⁷ *Chamberlain v. Woolsey*, 66 Neb. 141, 95 N. W. 38.

⁸ *Warne v. Rose*, 5 N. J. L. 809.

⁹ *Schaeffer v. Marienthal*, 17 Ohio St. 183.

¹⁰ *Wyckoff v. Anthony*, 90 N. Y. 442.

¹¹ *McAvoy v. Wright*, 137 Mass. 207; *Simmons v. Spencer*, 9 Fed. 581.

¹² *Ess v. Griffith*, 128 Mo. 50, 30 S. W. 343; *Manning v. Monaghan*, 23 N. Y. 539; *Hearty v. Klinkhammer*, 39 Minn. 488.

person for the value of the property converted.”¹ While the acts charged against the defendants must be sufficient to amount to a conversion, such acts need not be contemporaneous; it is enough if their purposes tend to the same result.²

§ 477. **Same Subject; Must be Community of Interest.** — In order, however, that a joinder of wrong-doers in one action should be possible, there must be some community in the wrong-doing among the parties who are to be charged with the act; the injury must in some sense be their joint work. It is not enough that the injured party has on certain grounds a cause of action against one for the physical tort done to himself or his property and has, on entirely different grounds, a cause of action against another for the same physical tort; there must be something more than the existence of two separate causes of action for the same act or default, to enable him to join the two parties liable in the same action. This principle is of universal application.³ So, a joint action against two or more for separate and distinct acts of conversion is not permissible, and if such action be brought, the plaintiff will be required to elect against which he will proceed, failing in which, he will not be entitled to a verdict.⁴

§ 478. **Illustrations of Same Subject.** — Where an officer's acts concerning chattels taken by him amount to a conversion of them, those at whose instance and request and under whose directions he acts are equally guilty with him and may be sued jointly with him.⁵ And where some of a number of attaching creditors whose writs were levied together assisted in removing plaintiff's goods and deprived him of possession, it was held that upon the dissolution of the attachments all of such creditors could be sued jointly or severally for conversion.⁶ But in an action of trover by a seller against a sheriff who seized and sold chattels in defiance of the seller's right of *stoppage in transitu*, it was held that the purchaser was not a necessary party.⁷ And it is said that the fact that several execution and attaching creditors gave the sheriff executing the writs separate and independent indemnifying bonds does not prove that by thus ratifying the

¹ D. M. Osborne Co. v. Plano Mfg. Co., 51 Neb. 502; Lewis v. Johns, 34 Cal. 629; Elliott v. Hayden, 104 Mass. 180; Pattee v. Gilmore, 18 N. H. 460, 45 A. D. 385; Cotton v. Marsh, 3 Wis. 221; Cone v. Iverson, 4 Wyo. 203.

² Ensley Lumber Co. v. Lewis, 121 Ala. 94; but see White v. Demary, 2 N. H. 546.

³ Pomeroy's Code Remedies, § 209; Miller v. Beck, 108 Ia. 575, 79 N. W. 344; Smith v. Day, 39 Ore. 531, 65 Pac. 1055; Hannon v. Nuevo Land Co., 112 Pac. 1103, — Cal. —.

⁴ Dahms v. Sears, 13 Ore. 47.

⁵ Calkins v. Lackwood, 17 Conn. 154, 42 A. D. 729.

⁶ Wehle v. Butler, 12 Abb. Pr. 139, 61 N. Y. 245.

⁷ Harris v. Tenny, 85 Tex. 254, 34 A. S. R. 796.

action of the sheriff each creditor thereby made himself a joint tortfeasor with the other creditors.¹ So in trover jointly against the county treasurer and the sheriff for property taken by the latter under a warrant from the former, the fact that the property taken by the sheriff was exempt could not constitute conversion by the treasurer whose only act was in issuing the warrant.² This is in pursuance of the principle applicable in this action that it is not proper to join as a defendant one who has neither had possession of the property nor participated in the act constituting the conversion.³ One apparent exception to this rule is in the case of partners; and it is well established that they may be joined as parties defendant in an action of trover although there was no joint conversion in fact. The law will imply a consent of a partner to the act of his co-partner constituting the conversion and thus render him liable.⁴

§ 479. **Joinder of Buyer and Seller.** — It is the general rule that where one who converts property sells it to another who has knowledge of the conversion, or of sufficient facts to put him on inquiry, the buyer and seller may be sued jointly for the conversion,⁵ as may all who subsequently buy with knowledge of the facts.⁶ But if the purchaser act in good faith and without notice, it is said that while he is yet liable, he is not jointly liable with his vendor, and should not be joined as a party defendant in an action against such vendor. "In trover against several defendants, all cannot be found guilty on the same count without proof of a joint conversion by all. And if they all join in an act with the intent to deprive the owner of the property, or to convert it to the use of one or both, they are jointly liable whether the act be one of sale and purchase, or of any other character. But the sale by one who has converted the property of another, to an innocent purchaser, cannot support a joint action in form *ex delicto* against the seller and buyer."⁷ Where mortgaged property was converted by a third person, it was held that in an action of trover by the mortgagor the mortgagee was a necessary party, because at least a part of the proceeds recovered belonged to

¹ *Livesay v. First Nat'l. Bank*, 86 Pac. 102 (Col.).

² *Bringard v. Stillwagen*, 41 Mich. 54, 1 N. W. 909.

³ *Updegraff v. Lessem*, 15 Col. App. 297, 62 Pac. 342.

⁴ *Bane v. Detrick*, 52 Ill. 19.

⁵ *Nickey v. Zonker*, 22 Ind. App. 211; *Smith v. Briggs*, 64 Wis. 497; *United Shoe Mach. Co. v. Holt*, 185 Mass. 97; *Petrie v. Williams*, 68 Hun 589; *Grant v. King*, 14 Vt. 367; *Smith v. Morgan*, 68 Wis. 358; *White v. Hall*, 40 Me. 574.

⁶ *Robertson v. Hunt*, 77 Tex. 321.

⁷ *Larkins et al. v. Eckwurzel*, 42 Ala. 322, 94 A. D. 651, citing 2 Hilliard, Torts, 467-448; *White v. Demary*, 2 N. H. 546; *Powers v. Sawyer*, 46 Me. 160.

him;¹ but if the mortgagee sues for such conversion, the mortgagor, though a proper party, is not a necessary one.²

§ 480. **Suit Against Husband and Wife.** — The fact that one sued alone for a conversion was a married woman not living separate and apart from her husband, the statute requiring that her husband should be joined with her, the court held the action not maintainable.³ The common law rule is that husband and wife may be sued jointly in trover.⁴

§ 481. **Effect of Mis-joinder.** — The effects of mis-joinder of parties defendant in actions of trover are not serious. Some may be released by the verdict of the jury and some held liable. "Where there is more than one defendant in an action of trover, one or more defendants may be acquitted and a verdict and judgment taken against the others, the verdict and judgment being shaped so as to hold liable those only who are shown by the evidence to have been guilty of conversion."⁵ And it is held that an order of dismissal of a joint defendant in an action of trover does not affect the liability of his co-defendant.⁶ And finding one joint defendant guilty of the conversion has been said to be tantamount to a dismissal of the action as to the others.⁷ But in one state it has been held that it is incumbent upon plaintiff to prove a joint conversion, amend his complaint so as to charge only one with the conversion, or submit to a non-suit.⁸

§ 482. **Limitation of Time to Sue.** — The right of action in trover accrues at the time of the conversion, except in cases involving fraud, as hereinafter shown.⁹ Therefore, where the conversion consists of a lawful possession but a wrongful sale or disposing of chattels, the cause of action accrues at the time of such wrongful disposal.¹⁰ If the conversion consists of a wrongful taking, the statute begins to

¹ Cobb v. Barber, 92 Tex. 309, 47 S. W. 963. *Contra*, Potter v. Lohse, 77 Pac. 419, 31 Mont. 91.

² Howard v. Burns, 44 Kan. 543; Boydston v. Morris, 71 Tex. 697; Cobb v. Barber, *supra*.

³ Taylor v. Darling, — Cal. —, 125 Pac. 249.

⁴ Davis v. Taylor, 41 Ill. 405; Heckle v. Lurney, 101 Mass. 344.

⁵ 21 Enc. Pl. & Pr. 1125, citing: Ray v. Light, 34 Ark. 431; Head v. Goodwin, 37 Me. 181; Barron v. Davis, 4 N. H. 338.

⁶ Carper v. Risdon, 19 Col. App. 530, 76 Pac. 744, citing Dahms v. Sears, 13 Ore. 47, 11 Pac. 899.

⁷ Davis v. Taylor, 41 Ill. 405.

⁸ Cooper v. Blair, 14 Ore. 255, 12 Pac. 370.

⁹ Hopper v. Hays, 82 Mo. App. 494; Mason, etc. Bank v. Bernard, 30 S. W. 580 (Tex. Civ. App.); Harpending v. Meyer, 55 Cal. 555; Million v. Medaris, 6 Baxt. (Tenn.) 132.

¹⁰ Thompson v. Iron Co., 41 W. Va. 574, 23 S. E. 795; Bishplinghoff v. Baner, 52 Ind. 519; Crump v. Mitchell, 34 Miss. 449; N. Y. Mut. Life Ins. Co. v. Garland, 23 Tex. Civ. App. 380, 56 S. W. 551; Wright v. Ward, 65 Cal. 525, 4 Pac. 534.

run at the time thereof.¹ And where defendant was lawfully in possession and made no wrongful sale or disposal of the chattels, the statute runs from the date of demand and refusal of possession.² The nature of the right sued on, and not the form of the action nor the relief demanded, determines the applicability of the statute of limitations. And it has been said in the case of trover against a bailee that the rights and obligations of a bailee of personal property are very much like those of a resulting trust in realty, and since it has always been held that the statute of limitations commences to run in favor of a trustee from the time he denies the trust and claims the property as his own, so, upon the same principle, the statute will not begin to run in favor of a bailee until he denies the bailment and converts the property to his own use.³ On the same principle, it has been held that where property originally came rightfully into the possession of defendant but he afterward held it adversely to the plaintiff, the statute did not run in his favor till he notified plaintiff of his adverse holding.⁴

§ 483. **Same Subject.** — Again, it is held that where money is delivered to an agent for a certain purpose, the statute of limitations does not begin to run from the time of the giving but from the time he failed to obey the instructions given him concerning it.⁵ In the case of conversion of bailed property, if conversion has taken place before the expiration of the term of bailment, the statute begins to run at that time and not at the expiration of the term.⁶ So, where plaintiff's goods, in the possession of her son-in-law, were pledged by him to secure a debt of his own; and more than three years before commencing the action, plaintiff learned of the pledge and notified the defendant that the goods were hers, but made no demand for their surrender; and the defendant afterward sold the property and applied the proceeds on the pledge-debt; it was held that the statute of limitations against an action for the conversion of the goods commenced to run at the time the defendant received the goods in pledge, without demand, and not from the time the goods were sold.⁷ Where possession of chattels is obtained wrongfully and is transmitted in

¹ *Merrill v. Ballard*, 59 Vt. 389, 8 Atl. 157; *Grunert v. Brown*, 119 Wis. 126, 95 N. W. 959; *Bennett v. Herring*, 1 Fla. 434; *Dean v. Nichols Co.*, 95 Ia. 89, 63 N. W. 582.

² *Reeves v. Nye*, 28 Neb. 571, 44 N. W. 736; *Andrews v. Carl*, 77 Vt. 172, 59 Atl. 167; *Koonce v. Perry*, 53 N. C. 58; *Auld v. Butcher*, 22 Kan. 400; *Austin v. Van Loon*, 36 Col. 294, 85 Pac. 183.

³ *Reizenstein v. Marquardt*, 75 Ia. 294, 39 N. W. 506, 9 A. S. R. 477, 1 L. R. A. 318.

⁴ *Cooper v. Cooper*, 132 Ill. 80, 23 N. E. 246.

⁵ *Brush v. Herlihy*, 8 Ohio Dec. 104.

⁶ *Chapman v. Hudson*, 46 Ark. 489.

⁷ *Kinkead v. Holmes & Bull Fur. Co.*, 24 Wash. 216, 64 Pac. 157.

turn to several, each possession is said to be a conversion, and as the liability of each successive holder is based upon his own act, the statute runs as to each from the date of the conversion by him.¹

§ 484. **Whether Knowledge Necessary to Start Statute.** — The general statement has been made that it is immaterial whether the plaintiff knew of the conversion or not, unless it was fraudulently concealed from him or he was chargeable with notice of the wrongful act.² But in one case it was said: "When actual knowledge of the conversion is not shown, the statute cannot commence to run against the consignee (the plaintiff) before it was his duty to apply for a delivery of the goods."³ But it appears that there is a great divergence of judicial opinion as to whether even the fraudulent concealment of the act of conversion will prevent the running of the statute. This question has received extended consideration in a late California case, and it will serve to show the views of various courts to quote at length from this case.

§ 485. **Same Subject.** — The case referred to arose over the alleged conversion of ore by defendants who had surreptitiously extracted ore from plaintiff's mining claim, the facts of which plaintiff had not discovered until the statute of limitation had run from the time of the wrongful taking. In considering whether the action was barred, the court say: "The defendants next claim that the action is barred by the statute of limitations, particularly by section 338 of the Code of Civil Procedure. The action was commenced on July 10, 1902. The jury found specifically that the ore for which recovery was allowed was removed from the plaintiff's mine by defendants prior to July 1, 1899. By sub-division 2 of section 338 in connection with section 312 it is provided that 'an action of trespass upon real property' is barred unless it is commenced within three years after the cause of action shall have accrued. The plaintiff insists that an exception exists in cases where the trespass is fraudulently concealed by the perpetrator from the knowledge of the owner of the land, and that in such cases the period of limitation does not begin to run until the aggrieved party discovers the trespass, or with reasonable diligence might have discovered it. It is also contended that the case, as made by the pleadings and the findings of the jury, does not fall strictly within the class described in sub-division 2 of

¹ Wells v. Ragland, 31 Tenn. 501.

² 38 Cyc. 2065, citing: Belt v. Marriott, 9 Gill 331; Hall v. Dickey, 32 Miss. 208; Yore v. Murphy, 18 Mont. 342, 45 Pac. 217; State University v. Bank, 96 N. C. 280, 3 S. E. 359; Gregory v. Montgomery, 23 Tex. Civ. App. 68, 56 S. W. 231; Dee v. Hyland, 3 Utah 308, 3 Pac. 388.

³ Houston, etc. Ry. Co. v. Adams, 49 Tex. 748, 30 A. R. 116.

section 338, but that it is governed by sub-division 4 which reads as follows: '4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.' The plaintiff did not discover the trespass, nor did it have any reasonable means of making such discovery until June 1, 1901, when its own workings encountered the wrongful excavation of the defendants. It was the settled rule in actions at law that the plaintiff's mere ignorance of the existence of the injury complained of, or of the facts constituting such injury, or of the identity of the person liable therefor, until the period of limitation had passed, will not prevent the running of the statute. This rule has been followed in this state in several cases in which the point that there was fraud involved in the cause of action itself, or a fraudulent concealment thereof, was not raised or considered.¹ In the last mentioned case, the court said: 'It is not true that, where damages result from negligence, the cause of action arises upon the date of the discovery of negligence, or of the negligent person. It is the date of the act and fact which fixes the time for the running of the statute. . . . And so throughout the law, except in cases of fraud, it is the time of the act and not the time of the discovery which sets the statute in motion.'

§ 486. **Same Subject.** — "But in actions at law where the party liable had fraudulently concealed the injury, or the essential facts thereof, from the party injured, there has been a great diversity of opinion on this question in the courts of this country and of England. The following cases hold that the period of limitation runs from the date of the commission of the injury or of the acts from which it flows, notwithstanding such fraudulent concealment thereof.² The following cases declare that such fraudulent concealment delays the running of the statute until the injured party discovers or with reasonable diligence might have discovered the facts constituting the injury and cause of action.³ The leading cases in favor of the running of

¹ *Lightner Min. Co. v. Lane et al.*, 161 Cal. 689, 120 Pac. 774, citing *Gale v. McDaniel*, 72 Cal. 334, 13 Pac. 871; *People v. Melone*, 73 Cal. 574, 15 Pac. 294; *Paige v. Carroll*, 61 Cal. 211; *Latin v. Gillette*, 95 Cal. 317, 30 Pac. 545, 29 A. S. R. 115; *Lumbert v. McKenzie*, 135 Cal. 100, 67 Pac. 6.

² *Somerses Co. v. Veghte*, 44 N. J. L. 511; *Troup v. Smith*, 20 Johns. 43; *Leonard v. Pitney*, 5 Wend. 30; *Allen v. Mille*, 17 Wend. 202; *Fee v. Fee*, 10 Ohio 469, 36 A. D. 103; *Howk v. Minnick*, 19 Ohio St. 462, 2 A. R. 413; *Atchison, etc. Ry. Co. v. Atchison Grain Co.*, 68 Kan. 585, 75 Pac. 1051; *Cocke v. McGuinnis*, 8 Tenn. 361, 17 A. D. 809; *Callis v. Waddy*, 16 Va. 511; *Clarke v. Reeder*, 1 Speer (S. C.) 398; *Franklin v. Waters*, 8 Gill (Md.) 322; *Barnes v. Williams*, 25 N. C. 481.

³ *Porter v. Smith*, 65 Ala. 169; *Snodgrass v. Bank*, 25 Ala. 161, 60 A. D. 505; *Tillson v. Ewing*, 87 Ala. 350, 6 So. 276; *Moses v. Taylor*, 6 Mackey (D. C.) 281; *Traers*

the statute in the foregoing list are *Troup v. Smith*, *Somerset Co. v. Veghte* and *Clarke v. Reeder*. The argument is simple, and is the same in all of them. It is most forcibly and elaborately stated in *Clarke v. Reeder*. It is, in brief, that the statute of limitations makes no exception in actions at law in regard to fraud or fraudulent concealment, and that the courts are bound by the terms of the statute and cannot add to it or declare an exception which would nullify it in its application to cases properly embraced in its terms. The leading cases declaring that a fraudulent concealment stays the operation of the statute are *Bailey v. Glover*, *Sherwood v. Sutton*, *Lewey v. Frick Co.*, and *Bulli Co. v. Osborne*. In *Bailey v. Glover*, the Supreme Court of the United States, by Justice Miller, says: 'We are of the opinion that the weight of judicial authority both in this country and in England, is in favor of the application of the rule to suits at law as well as in equity. And we are also of opinion that this is founded in a sound and philosophical view of the principles of the statute of limitation. They were enacted to prevent frauds, to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred or extinguished, if they ever did exist. To hold that by concealing a fraud or by committing a fraud in such a manner that it concealed itself until such a time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure. And we see no reason why this principle should not be as applicable to suits tried on the common-law side of the court's calendar, as to those on the equity side. . . . We hold that when there has been no laches or negligence on the part of the plaintiff in coming to the knowledge of the fraud which is the foundation of the suit and when the fraud has been concealed, or is of such a character as to conceal itself, the statute does not begin to run until the fraud

v. Clews, 115 U. S. 537, 29 L. Ed. 467; *Rosenthal v. Walker*, 111 U. S. 185, 28 L. Ed. 395; *Bailey v. Glover*, 88 U. S. 346, 22 L. Ed. 636; *Sherwood v. Sutton*, 5 Mason 143, Fed. Cas. No. 12,782; *Campbell v. Vining*, 23 Ill. 525; *Cook v. Chicago, etc. Co.*, 81 Ia. 551, 46 N. W. 1080, 25 A. S. R. 512, 9 L. R. A. 764; *Carrier v. Chicago, etc. Co.*, 79 Ia. 86, 44 N. W. 203, 6 L. R. A. 799; *District v. French*, 40 Ia. 601; *First Mass. Assoc. v. Field*, 3 Mass. 201, 3 A. D. 124; *Homer v. Fish*, 1 Pick. 438; 11 A. D. 218; *Welles v. Fish*, 3 Pick. 75; *Shelby Co. v. Bragg*, 135 Mo. 298, 36 S. W. 600; *State v. Hawkins*, 103 Mo. App. 255, 77 S. W. 98; *Bowman v. Sanborn*, 18 N. H. 206; *Way v. Cutting*, 20 N. H. 190; *Quimby v. Blackey*, 63 N. H. 77; *McDonnell v. Potter*, 8 Pa. 190, 49 A. D. 503; *Campbell v. Boggs*, 43 Pa. 524; *Morgan v. Tener*, 83 Pa. 305; *Lewey v. Frick Co.*, 166 Pa. 536, 31 Atl. 261, 45 A. S. R. 684, 28 L. R. A. 283; *Reynolds v. Hennessy*, 17 R. I. 177, 20 Atl. 307, 23 Atl. 639; *Munson v. Hallowell*, 26 Tex. 478, 84 A. D. 582; *Ripley v. Withee*, 27 Tex. 17; *Aufing v. Perkins*, 29 Tex. 348; *Tex. Etc. Co. v. Gay*, 86 Tex. 608, 26 S. W. 599, 25 L. R. A. 52.

is discovered by, or becomes known to, the party suing or those in privity with him.' ”¹

§ 487. **Complaint, Petition or Declaration; General Theory.** — It is a rule of general application, within which an action of trover is included, that a plaintiff must frame his pleading according to some definite and particular theory, and that the pleading must be good upon the theory attempted to be followed, or it will be adjudged insufficient as a basis of recovery, even though the facts stated be sufficient upon some other theory. And while it is now unnecessary and improper to aver the many fictions of a common law declaration in trover,² yet the principles of the common law action are still recognized and the plaintiff should allege the facts which were material there.³ Yet, keeping these requirements in view, it is to be remembered that the code now simply demands a statement in plain and concise language of the facts constituting the cause of action; and it is held that if the pleading contain such statement it is sufficient, even though the cause of action stated is of such a character that no name can be found for it in the books of common law pleading and practice.⁴ While this is the undoubted interpretation of the legislative will as expressed in the code, it will not be found carried out to the letter by the courts. The simple requirement of a concise statement of the facts is referred to in case after case in the adjudications; yet despite such fact it will be found that the courts require the pleader to proceed upon some definite theory, the allegations showing which must necessarily have been sufficient as a foundation of some particular form of action at common law. Thus, in one case plaintiff's pleading was held insufficient to support a verdict because it was impossible to determine whether it stated a cause of action in trover or one in detinue, and because as a declaration in either it was bad.⁵

§ 488. **Criticism of Rule Recognizing Forms of Action.** — The proneness of courts to refer back to the old forms has been roundly criticised. Pomeroy, in his work on “Code Remedies,”⁶ has this

¹ See, also, *Kane v. Cook*, 8 Cal. 449; *Allsopp v. Joshua, etc. Co.*, 5 Cal. App. 228, 90 Pac. 39; *San Pedro Co. v. Reynolds*, 121 Cal. 74, 53 Pac. 410; *Ott v. Hood*, 152 Wis. 97, 139 N. W. 762, which, although being an action on contract, holds that there is no exception to the application of the statute and that where an attorney fraudulently conceals from his client the fact that he has collected moneys belonging to the client, the statute begins to run a reasonable time after the collection and not from the date of knowledge of the collection by the client.

² *Pridgin v. Strickland*, 8 Tex. 427, 58 A. D. 124.

³ *Stirling v. Garritee*, 18 Md. 468; *Spencer v. Hewett*, 20 Ga. 426.

⁴ *Alter v. Stockham Bank*, 53 Neb. 223.

⁵ *Stirling v. Garritee*, 18 Md. 468; *Citizens Bank v. Mill Co.*, 152 Mo. 145; *Meixell v. Carr*, 25 Md. 46; *Porter v. Hermann*, 8 Cal. 619.

⁶ § 49.

to say: "As the distinctions between the common law forms of action are abolished, the practice since the codes, sometimes indulged in even by courts in their solemn judgments, of retaining the ancient nomenclature, and of describing a given cause as 'trespass', 'trover', 'assumpsit' and the like is productive of confusion alone. No practical rules or doctrines in the administration of justice according to the reformed system of procedure result from these old forms; no practical aid in the decision of a cause is to be obtained from regarding it as 'trespass', or 'trover' or 'assumpsit', or from the giving it any other name; no difficulties are removed nor doubts cleared up by a resort to this method of description. On the other hand there is a tendency to associate with these names the rules and doctrines which were once inseparable from them, but which have been in the most positive manner abrogated by the legislatures; in fact, much of the doubt and confusion which even yet accompany the administration of justice in those states which have adopted the reformed system of procedure, is due to a retention of these names by the bench and bar; and I believe that the reform itself will never produce its full results in simplicity and scientific accuracy until the ancient nomenclature is entirely forgotten or banished from the courts. The two systems of procedure are so entirely different, they are based upon notions so absolutely unlike, that any intermingling of their elements is impossible; the one which has been introduced by the legislative will must be left to be developed according to its own distinctive principles, without any interference from that which has been abandoned and discarded."

§ 489. **How Far Forms of Action Retained.** — But the thousands of cases decided under the heads of trespass, or assumpsit, or case, or trover, or replevin, or attachment, and so forth, show that either the courts and law writers do not agree with this criticism, or that they have not yet caught up with the reasoning presented. The fact remains that a certain wrong may be committed by one against the chattels of another which wrong the law denominates a conversion; and for this wrong there is a remedy, reachable only according to well established principles of procedure, and these principles are to be departed from by the pleader at the peril of a non-suit or an adverse judgment. But this does not mean that the pleader must frame his pleading in any set form or fashion or that he must use any specific words to present his cause. The theory of the pleading will be ascertained by taking it as a whole and not from particular words or phrases which may be contained in it, and where it states a cause of action for the conversion of property and contains a prayer

for damages, it will be upheld as stating a cause of action in trover although it may also contain allegations which are appropriate to other actions. But it is the general rule that the recovery must be *secundum allegata et probata* or not at all,¹ although it is said that a complaint in such action will not be construed strictly against the pleader.² However, the substance of the action must be stated with sufficient particularity to enable the defendant to properly prepare his defense.³

§ 490. **Title and Possession of Plaintiff.** — Trover is a possessory action, and therefore plaintiff's complaint should allege that at the time of the conversion he had a general or special property in the chattels converted, together with the possession or right of immediate possession.⁴ But in many cases it has been held that since the action is not to recover possession but the value of the property, the possession or right of possession of plaintiff at the time of the conversion need not be alleged where plaintiff's ownership is averred, since such ownership draws with it the right of possession.⁵ In the last case cited, an allegation that "the defendant wrongfully took into his possession property of which the plaintiff was the owner" was in substantial compliance with the requirements of good pleading. In a case involving the conversion of lumber and hardware, it was held that an allegation of ownership and possession of real estate sufficiently imported ownership of the trees and buildings from which the lumber and hardware had been taken.⁶ So, an allegation that a person executed and delivered to plaintiff a chattel mortgage on the chattels involved was held sufficient without also averring generally that plaintiff owned the property or that the mortgagor owned it or had an interest in it.⁷ "The allegation that the property converted was the property of the plaintiff is not an averment that the plaintiff was the absolute owner, but makes admissible any evidence

¹ Bixel v. Bixel, 107 Ind. 534.

² Berney v. Drexel, 33 Hun 34; Enos v. Bemis, 61 Wis. 656; Tipton v. Burton, 58 Mo. 435. See, *contra*: Mercantile Bank v. Frost, 62 N. J. L. 476; Johnson v. Oregon, etc. Co., 8 Ore. 35.

³ McElhannon v. Farmers Alliance Co., 95 Ga. 670; Sawyer v. Robertson, 11 Mont. 416; Kalekhoff v. Zoerlant, 40 Wis. 427.

⁴ Philipps v. Mihram, 38 Wash. 402, 80 Pac. 527; Owens v. Weedman, 82 Ill. 409; Baker v. Seavey, 163 Mass. 522; Cortel you v. Hiatt, 36 Neb. 584; Kehr v. Hall, 117 Ind. 405; Daggett v. Gray, 110 Cal. 169, 42 Pac. 568; Weil v. Ponder, 127 Ala. 296, 28 So. 656; Irving v. Hubbard, 12 S. D. 67; Stall v. Wilbur, 77 N. Y. 158.

⁵ Brickley v. Walker, 68 Wis. 563; Lafara v. Teal, 27 Ind. App. 580, 61 N. E. 794; Warnick v. Baker, 42 Mo. App. 439; Kerner v. Boardman, 14 N. Y. Supp. 787, 133 N. Y. 539.

⁶ Johns v. Schmidt, 32 Kan. 383; Railway v. Hutchins, 37 Ohio St. 282; Johnson v. Lumber Co., 45 Wis. 119.

⁷ Brunswick, etc. Co. v. Brackett, 37 Minn. 58.

showing that the plaintiff stood in such relation to the property that she has a right to maintain the action.”¹ Where it was alleged that the plaintiff “while owner” of the converted property delivered same to defendant, such was held sufficient to import possession.² So, in an action by an officer for the conversion of property upon which he had made a levy, it was held sufficient for him to aver that at the time of the conversion he had possession and the right of possession.³ But it is imperative that it appear in some way that the plaintiff had a property right and simply alleging that the defendant wrongfully carried away and converted the property, without stating that it was carried away from plaintiff or that plaintiff had any interest in it, will be held insufficient on demurrer.⁴ This requirement, however, is satisfied by the general statement that plaintiff “is the owner.” It is not necessary nor is it held good pleading to state the facts constituting plaintiff’s title nor how he became the owner. These are simply evidentiary facts to be shown in the event an issue be raised as to the ownership.⁵ And where the plaintiff alleges that at the time of the conversion he was the owner of the property and lawfully in possession thereof, it is immaterial that allegations in which he attempts to set forth in detail how he acquired possession and title are faulty. Such allegations, if they do not negative the plaintiff’s right of recovery, do not vitiate the general averment of title and possession.⁶

§ 491. **Whether Necessary to Allege Details of Title.**—But a plaintiff in attempting to declare in detail the facts constituting his title may overstate his case, or understate it. Thus, the plaintiff, instead of alleging that at the time of the conversion he owned the property or was entitled to the immediate possession, attempted to set out facts showing his right to the property involved by virtue of a statutory lien. The property was claimed under a statute which gave a lien for threshing to a person “owning and operating a threshing machine.” The plaintiff’s allegation was that he “was at all times hereinafter mentioned, doing business of running and operating

¹ *Duggan v. Wright*, 157 Mass. 228.

² *State v. Sullivan*, 99 Mo. App. 616.

³ *Penland v. Leatherwood*, 101 N. C. 509, 9 A. S. R. 38; *Burk v. Webb*, 34 Mich. 173.

⁴ *Johnson v. Oregon, etc. Ry. Co.*, 8 Ore. 35.

⁵ *Sturman v. Stone*, 31 Ia. 115; *Warren v. Dwyer*, 91 Mich. 414, 51 N. W. 1062; *Reed v. McKill*, 41 Neb. 206; *Hawkins v. Pearce*, 11 Humph. (30 Tenn.) 44; *Fike v. Art*, 76 Neb. 439, 107 N. W. 774; *Stewart v. Long*, 16 Ind. App. 164, 44 N. E. 63; *So. Railway Co. v. Attalla*, 147 Ala. 653, 41 So. 664; *Sparta Bank v. Butts*, 1 Ga. App. 771, 57 S. E. 1061.

⁶ *Malcom v. O'Reilly*, 89 N. Y. 156.

a threshing machine." It was held that the complaint was insufficient, since it contained no allegation that the plaintiff owned the machine.¹ However, in another action by a chattel mortgagee who alleged the execution of the mortgage and his lien on the property, without any averment of the conditions of the mortgage, maturity of the debt, or any other breach of condition, it was held that the complaint was insufficient because the averment of lien was a mere conclusion. The court said: "No fact is stated showing that plaintiff had the right of possession of the property in dispute. The petition should have pleaded the facts constituting the special ownership and plaintiff's right to possession at the commencement of the action."² So, where the complaint showed that at the time of the alleged conversion the defendant was in possession by virtue of a lease which constituted a bailment for hire, the pleading was held sufficient.³ In like manner, a complaint by a mortgagee against a subsequent mortgagee for a sale of the mortgaged chattels was adjudged bad in that it did not allege plaintiff's possession nor right of possession at the time of the sale, the theory of decision being that under the statute the mortgage did not convey title to the plaintiff nor any right thereon other than the right to foreclose.⁴ And generally the rule is said to be that where the facts as alleged show that the plaintiff did not, at the time of the conversion, have such title or right of possession as to enable him to maintain the action, these defects are not remedied nor assisted by general allegations which amount to legal conclusions.⁵

§ 492. **Alleging Ownership and Possession at Time of Conversion.** — The plaintiff's pleading must allege ownership and right of possession as of the time of the conversion.⁶ "The precedents from all the books on pleadings require that the petition must show that the plaintiff was in the actual possession of the property at the time of the conversion, or, if not in possession, that he was entitled to the

¹ *Parker v. Lisbon Bank*, 3 N. D. 87.

² *Hill v. Campbell Com. Co.*, 54 Neb. 59; *Hudelson v. Tobias Bank*, 51 Neb. 557.

³ *Triscony v. Orr*, 49 Cal. 612.

⁴ *Brinnian v. Baker*, 6 Wash. 50. But it said that an averment that the notes were past due and that the mortgage is still a lien is sufficient as showing a right of possession: *Johnson v. Anderson*, 60 Kan. 578. But the note and mortgage need not be set out, as they are merely evidence of plaintiff's right: *Stewart v. Long*, 16 Ind. App. 164, 44 N. E. 63. For cases where action had been brought by mortgagees, see: *Kavanaugh v. Oberfelder*, 37 Neb. 647; *Harvey v. McAdams*, 32 Mich. 472; *Strickland v. Type Foundry Co.*, 77 Minn. 210; *Harrington v. Stromberg, etc. Co.*, 29 Mont. 157; *Kern v. Wilson*, 73 Ia. 490; *Johnson v. State*, 59 Kan. 250.

⁵ *Paine v. British-Butte Co.*, 41 Mont. 28, 108 Pac. 12; *Anoka Bank v. St. Croix Co.*, 41 Minn. 141, 42 N. W. 861; *Little Rock Bank v. Fisher*, 55 Mo. App. 51; *Dow v. King*, 52 Ark. 282; *Scarborough v. Rowan*, 125 Ala. 509, 27 So. 919.

⁶ *Kennett v. Peters*, 54 Kan. 119, 37 Pac. 999, 45 A. S. R. 274.

immediate possession of the property.”¹ And a complaint in trover which alleges ownership in the present tense instead of averring it as of the time of the alleged conversion is defective.² But such defect is waived if not objected to until after trial.³ Where it was alleged that the plaintiff on the 8th day of May “was and now is” the owner of the property and that “on or about the twelfth day of May” the defendant converted the property, it was held that such allegation did not sufficiently show that plaintiff owned the property at the time of the conversion.⁴ But an allegation that on a certain day plaintiff owned and possessed the property, and that on the same day defendant converted it, was held sufficient.⁵ It is the better rule that it is unnecessary to allege title or the right of possession in plaintiff at the time of the commencement of the action,⁶ although the contrary has been held.⁷

§ 493. **Illustrations of Same Subject.**—A few more citations under this sub-division will suffice. It is said that alleging generally in a count in a complaint for conversion that plaintiff was the owner, in possession of, or entitled to the immediate possession of property claimed to have been converted is sufficient to admit proof that plaintiff at the time of conversion asserted a right thereto by virtue of a verbal mortgage.⁸ Plaintiffs alleged that, being owners of certain capital stock in defendant corporation, they deposited it with the company to be sold by it in consideration of a certain agreement; that defendant violated its agreement, sold the stock and issued it to others and refused to deliver it to plaintiffs or pay them its value; it was held that the complaint did not state a cause of action in trover, as it did not show a general or special ownership of plaintiffs in the property and a right to immediate possession at the time of the wrongful taking by defendant.⁹ A complaint which alleges that the defendants at a certain time and place conspired together to hinder and defraud plaintiff in her rights in her husband’s property; that while she had an action pending against her husband for separate maintenance they wrongfully took and carried away certain sheep

¹ *Kennett v. Peters*, 54 Kan. 119, 37 Pac. 999, 45 A. S. R. 274, citing, 2 *Estee’s Pl. & Pr.* § 2098; *Maxwell on Code Pleading*, 637.

² *Northness v. Hillestad*, 87 Minn. 304, 91 N. W. 1112.

³ *Smith v. Force*, 31 Minn. 119, 16 N. W. 764.

⁴ *Sawyer v. Robertson*, 11 Mont. 416.

⁵ *Irving v. Hubbard*, 12 S. D. 67, 80 N. W. 156.

⁶ *Hunt v. Hammel*, 142 Cal. 456, 76 Pac. 378; *Babcock v. Caldwell*, 22 Mont. 460, 56 Pac. 1081.

⁷ *Clapp v. Glidden*, 39 Me. 448.

⁸ *Reynolds v. Fitzpatrick*, — Mont. —, 107 Pac. 902; *Conner v. Bludworth*, 54 Cal. 635.

⁹ *Glass v. Basin Min. Co.*, 3 Mont. 21, 77 Pac. 302; *Wetzell v. Power*, 5 Mont. 214, 2 Pac. 338; *Reardon v. Patterson*, 19 Mont. 231, 47 Pac. 956.

then and there the property of her husband and in his possession, does not state a cause of action for a conversion, in that it does not aver a general or special ownership in the property, together with the right of immediate possession at the time of the conversion.¹ In an action for the conversion of money lost and found, the court said: "To sustain the action, it was incumbent upon the plaintiff to allege and prove some property in the money. In support of the allegation that he was the owner of the coin, he would be at liberty to prove either a general property or special property within the meaning of the rule laid down in *Reinstein v. Roberts*.² In that case it was held that under an allegation of general ownership the plaintiff was entitled to show that he had a chattel mortgage upon the property in question, the condition of which was broken in that the debt for which it was security was over-due and unpaid. The rule is also laid down in general thus in *Weeks v. Hackett*.³ The history of how the plaintiff came to be the owner of the money is evidential only, or a matter of testimony, the allegations concerning which might have been stricken out as redundant or as pleading evidence."⁴

§ 494. **Description of the Property.** — In an action of trover, the plaintiff must describe the property claimed to have been converted. There are two main reasons why this is necessary. In the first place, the defendant as well as the court and jury, should know what is involved, to the end that the defendant may properly prepare and present his defense, and that the court and jury may intelligently hear the case; and in the next place it should appear what property is being sued for in order that the defendant may be protected from another suit based upon the same cause of action. But certainty to a common intent is all that is required,⁵ since unlike the action of replevin where the description must be specific enough to enable an officer to identify and seize the property, it is sufficient in an action of trover that the complaint advise the defendant what property he is charged with having converted.⁶ Yet it is not sufficient to simply say that the defendant converted the plaintiff's "property." Such description is the most general that could be used, and does not apprise the defendant or the court of what the plaintiff's claim is

¹ *Raymond v. Blancgrass et al.*, — Mont. —, 93 Pac. 648.

² 34 Ore. 87, 55 Pac. 90, 75 A. S. R. 564.

³ 104 Me. 264, 71 Atl. 858, 129 A. S. R. 390, 19 L. R. A. (N. S.) 1201.

⁴ *Robertson v. Ellis*, — Ore. —, 114 Pac. 100.

⁵ *Taylor v. Morgan*, 3 Watts (Pa.) 333.

⁶ *Blackie v. Neilson*, 6 Bosw. (N. Y.) 681; *Hazelton v. Locke*, 104 Me. 164, 71 Atl. 661, 20 L. R. A. (N. S.) 35; *Ball v. Patterson*, 2 Fed. Cas. No. 814, 1 Cranch C. C. 607; *Bryden v. Croft*, 46 S. W. 853 (Tex. Civ. App.).

for.¹ The following was held a sufficient description under the particular allegations of the complaint: "The following property, to-wit, various articles of personal effect, divers farming implements and implements of husbandry, but plaintiff is unable to state the precise nature further than here stated, nor the precise value thereof in detail."² But however sufficient in detail the complaint may be in describing certain articles of property, it will be subject to demurrer unless it clearly show that the property is such as may be the subject of conversion. Thus, where the allegation set forth the conversion of "large and valuable deposits of sand and gravel" in its original bed, it was held that such stated no cause of action, as the property was real estate and therefore could not have been converted.³ Likewise, where the subject of the action was a house, it was held that the description must be sufficient to show that the house was personal property.⁴ So, in a state where it is held that trover will not lie for the conversion of "shares" of stock in a corporation, but only for the certificate representing them, it has been held that a declaration describing the subject-matter of the action as certain "shares" in a railway company is demurrable.⁵

§ 495. **What Description Sufficient.** — With these general principles in mind, I will refer to a few instances in which the description has been held sufficient. Thus, where plaintiff described the property as "3 horses, 3 carriages and 1 set of double harness", the description was held sufficiently specific.⁶ Likewise, the description "a certain black mare of the value of one hundred dollars."⁷ And as against a general demurrer, a declaration alleging the property to be "large sums of money, the property of the plaintiff" has been held good.⁸ And the same of a description reading "\$1850 in cash."⁹ However, it has been held with perhaps less reason that an allegation of the conversion of "three thousand five hundred dollars, lawful money in the United States" is not a sufficient description.¹⁰ On the other hand, in an action for the conversion of "sum of five thousand nine hundred and fifty (\$5950.00), money of the Republic of

¹ *Randlette v. Judkins*, 77 Me. 114, 52 A. R. 747; *McLennon v. Livingston*, 108 Ga. 342, 33 S. E. 974; *Thayer v. Kitchen*, 200 Mass. 382, 86 N. E. 952.

² *Bryden v. Croft*, *supra*, an action by an administrator for the conversion of property belonging to the estate.

³ *Glencoe Land, etc. Co. v. Hudson Bros. Co.*, 138 Mo. 439.

⁴ *Davis v. Taylor*, 41 Ill. 405.

⁵ *Neiler v. Kelley*, 69 Pa. St. 403.

⁶ *Crocker v. Hopps*, 78 Md. 260, 28 Atl. 99.

⁷ *Heddy v. Fullen*, 1 Blackf. (Ind.) 51.

⁸ *Iasigi v. Shea*, 148 Mass. 538, 20 N. E. 110.

⁹ *Durham v. Cox*, 81 Conn. 268, 70 Atl. 1033.

¹⁰ *McElhannon v. Farmers All. Co.*, 95 Ga. 670, 22 S. E. 686.

Mexico " in which the objection was made that the description was insufficient inasmuch as there is no dollar in the Mexican monetary system, the court in holding the description sufficient, said: " It is argued by counsel for defendant in error that the complaint is fatally defective in that there is no sufficient description of the property lost, for the reason that there is no such thing as a ' dollar ' in money of the Republic of Mexico. We do not take judicial knowledge of the monetary system of the Republic of Mexico or of other foreign countries. We cannot therefore, as a matter of law, say that the ' peso ' is the money unit of Mexico and that the ' dollar ' is unknown to its laws." ¹ It is also held sufficient to describe the property as \$3000 in United States treasury and national bank notes of various denominations and value.² In this case, however, objection was not made to the description until upon motion in arrest of judgment, and it was said that then less strictness was required than upon demurrer. So, it is held that a general description of bank bills is sufficient without naming the bank,³ and that, while some description must be given,⁴ yet this is waived unless objection is made before verdict.⁵ Where the description was " bank notes, commonly so called, issued by certain incorporated banks," the names of the banks and the number of the notes being given, it was held a sufficient description, since the notes would be payable to bearer and on demand.⁶ And where the complaint was for " divers promissory notes against sundry persons and in various amounts of great value, to-wit, \$4000 ", the description was held sufficient.⁷ But where the declaration contained two counts, and the second count described the notes involved as " eleven other promissory notes, having the like drawers, indorsers, description and value as the promissory notes in the first count mentioned ", it was held insufficient to describe the property by reference.⁸

§ 496. **Same Subject.** — In an action of trover by a corporation for the conversion of moneys collected by the defendant while managing agent of the plaintiff and which he failed to pay over, the court said: " But it is said the complaint is insufficient because it does not describe with reasonable certainty the identical money alleged

¹ *Ramirez v. Main*, 11 Ari. 43, 89 Pac. 508, an action by plaintiff to recover money lost by his servant at gambling.

² *Henry v. Sowles*, 28 Fed. 521.

³ *Moody v. Keener*, 7 Porter (Ala.) 218.

⁴ *Little v. Gibbs*, 4 N. J. L. 211.

⁵ *Colebrook v. Merrill*, 46 N. H. 160.

⁶ *Dows v. Bignall*, Lat. Supp. H. & D's. Rep. 407.

⁷ *Burrows v. Keays*, 37 Mich. 430.

⁸ *Bank of New Brunswick v. Nielson*, 15 N. J. L. 337, 29 A. D. 691.

to have been converted by the defendant. In the nature of things, however, that was an impossibility. The complaint shows that the defendant was the trusted agent and manager of the plaintiff, with power and authority to collect all moneys due it, and during his term of service received and collected large sums, a part of which he failed to account for, but converted to his own use. It is impossible for the plaintiff to specify or describe any particular money converted, nor was it necessary to do so. The conversion consisted of distinct acts done by virtue of the confidential relations existing between the plaintiff and defendant. These separate acts may not be capable of either allegation or proof, but the aggregate result is, and that constitutes the conversion. No stricter rule, certainly, should be applied in an action by a principal against his agent for conversion of funds which came into his hands by virtue of his employment than would be required in a prosecution for the crime of embezzlement; and in the latter case a charge of embezzlement of a certain amount on a certain day will cover and admit evidence of a series of connected transactions showing a continuous offense.”¹

§ 497. **Description must be Reasonably Certain.** — “In trover the goods should be described with convenient certainty that the jury may know what is meant; but the same accuracy is not required as in detinue, where the things themselves may be recovered. The courts construe liberally the descriptions of quantity, and are inclined to sustain the declaration whenever, by any reasonable intendment, it can be supposed the evidence may give certainty to terms ordinarily used in a loose and indefinite sense; because it is agreeable to experience that many such words are used in particular trades with definite significations. But where the quantity of the articles is entirely uncertain, and they are not aided by any reasonable intendment, and still more, where the nature of the articles is uncertain, the declaration has always been held insufficient. In the present case, the claim relates to ‘divers goods, to-wit, a lot of goods being in a store in Alton.’ It is entirely uncertain both as to kind and quantity of the goods, and is supported by no case we have met with. These counts must be held bad and insufficient.”² In another instance where the property was described as a trunk con-

¹ *Salem Light Co. v. Anson*, 41 Ore. 562, 67 Pac. 1015, 69 Pac. 675.

² *Edgerly v. Emerson*, 23 N. H. 555, 55 A. D. 207. But it is said that an objection to such description after verdict comes too late: *Hall v. Susskind*, 120 Cal. 559, 53 Pac. 46. See, however, *Greenbaum v. Traylor*, 102 Cal. 642, 36 Pac. 957, where it was held that the words “All the saloon fixtures on the premises No. 424 M street” were a sufficient description. See: *Leitner v. Strickland*, 89 Ga. 363, 15 S. E. 469; *Phillippos v. Mihran*, 38 Wash. 402, 80 Pac. 527; *Stanley v. Sierra Nevada Co.*, 118 Fed. 931.

taining clothes and a tool chest containing divers tools and working utensils, it was held that the description was insufficient as to the contents, but sufficient as to the trunk and chest.¹

§ 498. **Description Contained in Schedule.** — It has been held that the complaint or declaration will be sufficient as to description of the property claimed to have been converted if the specification be contained in a schedule attached to the pleading.² But it is further said that such schedule not recited in full in the pleading can only be made part thereof by making it so that it can be identified, and reciting in the pleading that such exhibit is so marked and made a part of it.³

§ 499. **Value of Property and Damages.** — There is a direct conflict in the decisions upon the question of the necessity of alleging the value of the property converted in a complaint in trover for such conversion. Some courts say that value is a material issue,⁴ while by others such materiality is denied.⁵ They seem to agree that an entire failure to allege either value of the property or sustaining damages for its conversion renders a complaint or declaration insufficient.⁶ It is difficult to say which is the better rule as to the necessity of alleging value, or which is supported by the weight of authority. There is good reason to support either view, and the practitioner will, of course, be governed by the rule adopted in his own state. In support of the rule rendering such allegation unnecessary, it is said that where there is an allegation of damages, this dispenses with the necessity of alleging value, since value goes only to the *quantum* of damages and is a mere matter of form.⁷ On the other hand, it is said that the averment of value is material this far; that if it be not denied, it need not be proved.⁸ And where it is held that the allegation is material, it is also said that a failure to make the averment is reachable only by special demurrer.⁹

¹ *Ball v. Patterson*, 1 Cranch (C. C.) 607; *Benson v. Eli*, 16 Col. App. 494, 66 Pac. 450.

² *Stinchfield v. Twaddle*, 81 Me. 273, 17 Atl. 66.

³ *Caspary v. Portland*, 19 Ore. 496, 24 Pac. 1036, 20 A. S. R. 842; *Rider v. Robbins*, 13 Mass. 285; *Hilton v. Burley*, 2 N. H. 193; *Edgerley v. Emerson*, 23 N. H. 555, 55 A. D. 207.

⁴ *Troxler v. Buckmer*, 126 Cal. 288, 58 Pac. 691; *Recht v. Glickstein*, 162 Ind. 32, 69 N. E. 667.

⁵ *Pearpoint v. Henry*, 2 Wash. (Va.) 192; *Connoss v. Meir*, 2 E. D. Smith 314.

⁶ *Stirling v. Garritee*, 18 Md. 468; *Allen v. Toner*, 24 Ind. App. 121, 56 N. E. 250; *Harrington v. Stromberg-Mullins Co.*, 29 Mont. 157, 74 Pac. 413; *Cohnfeld v. Walsh*, 2 App. Div. 190, 37 N. Y. S. 833; *Salem Co. v. Anson*, 41 Ore. 552, 69 Pac. 675.

⁷ *Richardson v. Hall*, 21 Md. 399; *Humphreys v. Minn. Clay Co.*, 94 Minn. 469, 103 N. W. 388; *Gould v. Brown*, 9 N. J. L. 165; *Gleason v. Morrison*, 20 Misc. 320, 45 N. Y. S. 684; *Sheehan v. Levy*, 1 Wash. St. 149; *Horneffer v. Duress*, 13 Wis. 603.

⁸ *Hixon v. Pixley*, 15 Nev. 470.

⁹ *Fry v. Baxter*, 10 Mo. 302.

§ 500. **Sufficient Allegation of Value.** — It is proper to allege in a complaint or declaration in trover that the property was of a specified value and that the conversion was to the damage of plaintiff in a stated amount. But it is the general holding that where the plaintiff's pleading alleges the value of the property without stating in conclusion that plaintiff was damaged by the conversion in any particular amount, the pleading is sufficient, as it will be inferred from the allegation of value that plaintiff was damaged to the amount of such value.¹ Such action follows the general rule of pleading and practice that a plaintiff cannot recover more damages than he alleges.² Where claim was made for the conversion of several articles, it was held sufficient to allege the value of each article without setting out the aggregate.³ So, in an action for the conversion of a promissory note in which the complaint contained a statement of the date of the note, the amount of the principal and the rate of interest, such allegation was held sufficient upon which to predicate the conclusion that plaintiff was damaged in the amount named. It was said that the value of the note would be taken to be its face value unless the defendant showed it to be less.⁴ And in a case of trover for the conversion of mortgaged property where it was alleged that the property was sold for twenty thousand dollars such was held a sufficient statement of value.⁵ And where the property involved was a promissory note and its exact amount was unknown to plaintiff, it was held sufficient to allege it to be "of great value, to-wit, — dollars."⁶ It is said also that a complaint for a sum of money lost at gambling is not defective in stating the value at the time it was lost instead of the time when demand was made for it by the owner,⁷ the plaintiff being entitled under such a pleading to recover within the limits of the prayer its value at the time of conversion, whatever date that may have been.

§ 501. **Allegation of Special Damage.** — If there have been special damages resulting from the alleged conversion — that is, damages other than those which accrue as a necessary result — such must

¹ *Ryan v. Hurley*, 119 Ind. 115; *Mattingly v. Darwin*, 23 Ill. 618.

² *Hannon v. Bramley*, 65 Conn. 193; *Georgia Ry. Co. v. Crawley*, 87 Ga. 191.

³ *Shaw v. Adams*, 2 Willson Cov. Cas. Ct. App. 177.

⁴ *Harlan v. Brown*, 4 Ind. App. 319; *Probst v. Skillen*, 16 Ohio St. 382, holding that the fact that the notes sued for had no value was a matter of defense. And *Jefferson v. Hale*, 31 Ark. 286, a verdict without objection to failure to allege value cures the defect. See *Troxler v. Buckner*, 126 Cal. 288, 58 Pac. 691.

⁵ *Cone v. Iverson*, 4 Wyo. 203; *Herrlich v. McDonald*, 80 Cal. 460, 22 Pac. 299.

⁶ *Bissell v. Drake*, 19 Johns. (N. Y.) 66. See, however, *Fry v. Baxter*, 10 Mo. 302.

⁷ *Ramirez v. Main*, 11 Ari. 43, 89 Pac. 508.

be pleaded before plaintiff can recover.¹ Thus, it is held that if special damages are sought to be recovered, growing out of the use of the property, defendant's knowledge of the existence of such use must be shown either by direct allegation or by facts alleged which would imply such notice.² And if it is sought to obtain judgment for expenses in obtaining a return of the property, such must be properly alleged.³ So, the plaintiff cannot recover exemplary damages unless he state facts clearly showing his right thereto.⁴ But it is held that it is sufficient where he alleges that the acts of the defendant were wrongful, willful and wanton.⁵ If the property has been returned to plaintiff pending an action of trover, damages for loss in use or deterioration in value must be specially averred.⁶ Thus, in an action against a sheriff for goods taken under execution, where a return of the goods had been accepted by plaintiff without condition, it was held that more than a nominal sum could not be recovered in the absence of an allegation of special damages. Said the court: "If the defendants had come to the court to stay proceedings on the delivery of the goods, the plaintiffs would not have been compelled to accept them, unless they were in the same plight as when they were taken, and no injury had accrued to the plaintiffs. But the plaintiffs have taken upon themselves to accept the goods without imposing any condition on the defendants, and then proceed to trial, as they had a right to do, to recover their costs; in order to do which, according to the practice of a century, the jury may, under such circumstances, give them nominal damages. But the plaintiffs seek for more; and though no special damage has been alleged in the declaration, and the damage complained of is not necessarily incidental to the wrongful taking of the property, they claim to recover the amount of rent paid in respect of the premises on which the goods were detained for the period during which they were under detention. If an action of trespass had been brought, such an allegation of special damage might perhaps have been sustained; this, however, is an action of trover, and the declaration, which is in the

¹ *Smith v. Connor*, 46 S. W. 267 (Tex. Civ. App.); *Agnew v. Johnson*, 22 Pa. St. 471, 62 A. D. 303; *Inman v. Ball*, 65 Ia. 545; *Ross v. Malone*, 97 Ala. 525; *Jones v. Horn*, 51 Ark. 19; *Barrelett v. Bellgard*, 71 Ill. 280; *Coulson v. Panhandle Bank*, 54 Fed. 855, 13 U. S. App. 39; *De La Vergne v. Richardson*, 198 Mo. 189, 95 S. W. 898; *Springer v. Jenkins*, 47 Ore. 502, 84 Pac. 479.

² *Smith v. Connor*, *supra*.

³ *Pattee v. McCabe, etc. Co.*, 97 Mo. App. 356, 71 S. W. 374; *Western Land Co. v. Hall*, 33 Fed. 236.

⁴ *Sturgis v. Keith*, 57 Ill. 451.

⁵ *Alderson v. Gulf Railway*, 23 S. W. 617 (Tex. Civ. App.).

⁶ *Barrelett v. Bellgard*, 71 Ill. 280; *Harris v. Finberg*, 46 Tex. 79; *St. Louis Co. v. Mudford*, 44 Ark. 439.

common form, seeks only damages for the detention of the goods which were delivered up before the trial. But it is said that if damages may be recovered in trover, where the goods have been given up before the action, by a stronger reason may a plaintiff claim damages where injury has resulted to him from the conversion, and restoration of the goods has not been made until after the action is commenced; and many cases have been cited to that purport, in all of which I am disposed to agree. But in all of them the damage was either an injury to the property converted, or the actual and necessary consequence of the conversion . . . the injury of which the plaintiffs complain not being a damage necessarily consequent on the wrongful conversion of the goods, if it could in any shape fall within the remedy of an action for trover, ought at least to have formed the subject of a special allegation."¹ The same rule of pleading applies where plaintiff proceeds under a statute providing for double damages.²

§ 502. *Allegation of Acts Constituting Conversion; in General.* — It is essential in an action in trover that the complaint or declaration shall allege a conversion by the defendant. The conversion is the gist of the action, and it must therefore appear from the pleadings that this is the basis of the plaintiff's grievance.³ It is sufficient, the other requisites of the complaint appearing, to simply state that the defendant converted the property to his own use. It has been held that it is not even necessary to aver that the conversion was wrongful, since a conversion by necessary intentment implies that the act was wrongful; so the allegation that the defendant took and carried away the property and converted it to his own use was held sufficient.⁴ And again it was said that it was unnecessary for plaintiff to aver that defendant unlawfully appropriated the property, because the act of conversion is inherently a wrongful and unlawful appropriation.⁵ But the averment of conversion should be definite and positive, and should leave no room for speculation as to whether or not the defendant is charged with a wrongful appropriation. However, even in a case where there is some doubt as to whether a conversion is charged, the defendant may himself cure the doubt.

¹ *Moon v. Raphael*, 2 Bing. (N. C.) 310; see, *contra*, *Rank v. Fank*, 5 Pa. St. 211.

² *Springer v. Jenkins*, 47 Ore. 502, 84 Pac. 479.

³ *Baker v. Malone*, 126 Ala. 510, 28 So. 631; *Watriss v. Pierce*, 36 N. H. 232; *Edwards v. Sonoma Bank*, 59 Cal. 136; *Wells v. Connable*, 138 Mass. 513; *Mercantile Bank v. Frost*, 62 N. J. L. 476; *Enos v. Bemis*, 61 Wis. 656; *Palmer v. O'Rourke*, 130 Wis. 507, 110 N. W. 389; *Bryden v. Croft*, 46 S. W. 853 (Tex. Civ. App.).

⁴ *McDonald v. Mangold*, 61 Mo. App. 291.

⁵ *Reish v. Reynolds*, 68 Ind. 561; *Cordill v. Minn. Elev. Co.*, 89 Minn. 442, 95 N. W. 306.

Thus, in a case where it was alleged that "by the defendant's failure and refusal to deliver the goods, and by the unlawful conversion of said goods by the defendant, and depriving plaintiff of them, he has been damaged in said sum," it would seem doubtful whether a conversion was sufficiently charged, yet it was held that this doubt would be resolved in favor of plaintiff since the answer of defendant denied that he had converted the goods.¹ And it is also held that the allegation that the defendant wrongfully took and carried away the goods is sufficient since it is equivalent to alleging that he converted the goods.² But on the other hand it has been said that the allegation that the defendant unlawfully, fraudulently, willfully and maliciously took the property does not charge a conversion but simply states a conclusion.³ So, it is not sufficient to allege a conversion in the alternative, as where it was stated that the defendant took *or* converted the property.⁴

§ 503. **Alleging Conversion by Defendant.** — It is necessary that the plaintiff shall allege that the property was converted by the defendant. And the averment must be positive so as to amount to a direct charge against him. As illustrative of an insufficient charge, a complaint was considered in an action wherein the defendant was an execution creditor and the conversion consisted of a wrongful levy. The complaint charged that the sheriff, acting under the writ, sold the property "as plaintiff charges and avers, for the uses and benefit of the defendant"; and it was also alleged "said purchaser at said sheriff's sale claims said stock by virtue of said sale, and retains possession of same." Such a complaint was held defective in failing to allege a conversion by the defendant.⁵ And in an action by an attachment debtor against the creditor, the complaint was held insufficient to charge a conversion against the defendant where it only stated that the defendant "by and through" the officer converted the property to his own use and failed to allege any act by the defendant subsequent to directing the levy to be made which would amount to a conversion. It was held that the complaint merely stated a conclusion of law.⁶ So, it is not sufficient to allege that one defendant "caused" the other to take the goods.⁷

¹ *Louisville Co. v. Lawson*, 88 Ky. 496.

² *Hutchings v. Castle*, 48 Cal. 152; *Warnick v. Baker*, 42 Mo. App. 439.

³ *Triscony v. Orr*, 49 Cal. 612.

⁴ *Bernstein v. Warland*, 33 Misc. 280, 67 N. Y. S. 444. That the remedy in such case is not by demurrer, but by motion, see *Turner v. Bank*, 26 Ia. 562.

⁵ *Edwards v. Sonoma Bank*, 59 Cal. 136; *Osborne v. Metcalf*, 112 Ia. 540.

⁶ *Burt v. Decker*, 64 Ia. 106, 19 N. W. 873.

⁷ *Bernstein v. Warland*, 33 Misc. 280, 67 N. Y. S. 444. See *Emporia Bank v. Layfeth*, 63 Kan. 17, 64 Pac. 971.

§ 504. **Illustrations of Same Subject.** — But in an action of trover against a sheriff for the conversion of exempt property seized under execution, an allegation in the declaration that such sheriff by his deputy or agent, naming him, did convert and dispose of the property, is sufficient to charge the sheriff with the conversion.¹ And where the defendants, who were in fact partners, were sued in trover, it was held unnecessary to allege the partnership or to make the charge in any other manner than as if no partnership had existed.² So, in an action of trover against a partnership as such, where the defendants severally plead the general issue, the allegation of partnership is immaterial and need not be proved.³ And, on like principle, where the defendant charged with the conversion is an officer, it is not necessary to sue him in his official capacity, as it is said that one is not bound to know why another meddles with his property.⁴ A complaint contained two counts showing a single trespass and one showing a single conversion, which was alleged to be the act of the defendants, and it was held that this charged a conversion against the defendants jointly.⁵ But where two or more persons act, each for himself and independently of the other in a proceeding, the results of which may be injurious to another, they cannot be jointly held liable for the acts of each other.⁶

§ 505. **Alleging Manner of Conversion.** — It is said that the allegation of the conversion may be of a general nature without setting forth matters of evidence,⁷ or on the other hand that it may consist of a statement of the facts showing the conversion.⁸ It is the safer and more general practice, however, to simply state that the defendant converted the property to his own use, leaving the details to be developed by the evidence. As has been stated: "It was not, under the former system, and is not, in my opinion, now necessary to state the manner in which the defendant has converted property for which trover is brought; but the simple allegation that he has done so is sufficient."⁹ Again, the ultimate fact to be proved

¹ *Hutchinson v. Whitmore*, 90 Mich. 255, 30 A. S. R. 431.

² *Banner v. Schleissinger*, 109 Mich. 262.

³ *Head v. Goodwin*, 37 Me. 181.

⁴ *Dane v. Gilmore*, 49 Me. 173.

⁵ *Mattingly v. Houston*, 167 Ala. 167, 52 So. 78.

⁶ *Livesay v. Bank*, 36 Col. 526, 86 Pac. 102.

⁷ *Richardson v. Hall*, 21 Md. 399; *Sanford v. Jenson*, 49 Neb. 766, 69 N. W. 108; *Smith v. Thompson*, 94 Mich. 381, 54 N. W. 168; *Schmidt v. Bank*, 64 Hun 298, 19 N. Y. Supp. 252, 138 N. Y. Supp. 631, 33 N. E. 1084; *Meyer v. Doherty*, 133 Wis. 398, 113 N. W. 671, 13 L. R. A. (N. S.) 247; *Clay v. Siher*, 2 La. Ann. 997.

⁸ *Pharis v. Carver*, 13 B. Mon. 236; *Louisville Co. v. Balch*, 105 Ind. 93, 4 N. E. 288; *Lyon v. Bond*, 3 Wash. Ty. 407, 19 Pac. 35; *Ashton v. Heydenfeldt*, 124 Cal. 14, 56 Pac. 624; *Williams v. Brassell*, 51 Ala. 397; *Perry v. Musser*, 68 Mo. 477.

⁹ *Decker v. Mathews*, 12 N. Y. 313.

is the conversion; and in actions of this nature, a petition with proper allegations of plaintiff's ownership of the property, and of its value, and which avers that the defendant converted it to his own use, states a cause of action.¹ Thus, it was alleged that where the plaintiff, having sold to defendant a certain number of trees, and that the defendant unlawfully converted to his own use a number of trees in excess of those sold, it was held that the complaint was sufficient although it did not allege that the defendant accepted, used or cut any trees in excess of the number sold.²

§ 506. **Illustrations of Same Subject.** — It is said in another case: "It is contended that the averment of conversion is not sufficient. The averment is, after a description of the property, that the defendant's testator 'unlawfully converted and disposed of the same to his own use', and the contention is that there should have been a statement of the particular facts constituting the conversion; that is, the specific acts and methods by which the conversion was accomplished. This contention is not maintainable. An averment that the defendant converted the property to his own use is a sufficient averment of the fact of conversion."³ And again: "The complaint charged the defendants with unlawfully and fraudulently taking the money from the plaintiff and converting the same to their own use. If these allegations, which were stricken from the complaint, were true, they are entirely immaterial because it makes no difference to whom the defendants gave the money or for what they spent if after they took it and converted it to their own use. They would be liable for its return in any event. It was likewise immaterial whether they loaned to an insolvent or a going corporation or to a private person, if such loan was made for their own use and benefit, and not for the bank; and therefore allegations of this character were subject to be stricken from the complaint. If it was necessary to show that the money was converted to the use of the defendants, it is probably true that evidence showing the purpose for which the money was used was admissible to show that the defendants had converted the money to their own use. But the allegation that the money was converted to the use of the defendants was sufficient for that purpose."⁴ So, "The allegation that the

¹ *Baltimore, etc. Ry. Co. v. O'Donnell*, 49 Ohio St. 489, 34 A. S. R. 579, 21 L. R. A. 117. See: *Johnson v. Ashland Co.*, 45 Wis. 119; *Nance v. Georgia, etc. Ry. Co.*, 35 S. C. 307; *Johnson v. Wabash Ry. Co.*, 22 Mo. App. 597; *Nichols, etc. Co. v. Thresher Co.*, 70 Minn. 528; *Snyder v. Baker*, 74 Ind. 47; *Woodham v. Cline*, 130 Cal. 497, 62 Pac. 822.

² *Paalzow v. No. C. Est. Co.*, 104 N. C. 437.

³ *Lowe v. Ozmun*, 137 Cal. 257, 70 Pac. 87; *Daggett v. Gray*, 110 Cal. 169, 42 Pac. 568.

⁴ *First Nat'l Bank v. Gaddis*, 31 Wash. 596, 72 Pac. 460.

defendants converted and disposed of the property for their own use is the allegation of a fact sufficient in the absence of a special demurrer, to sustain a judgment. Upon the trial of an issue on this averment, the plaintiff would be at liberty to introduce evidence of a demand and refusal, if such evidence were sufficient or necessary to establish a conversion; and he would also, under this averment, be authorized to offer evidence that the defendant had sold or otherwise dealt with the property in repudiation of the claim of plaintiff."¹

§ 507. **Alleging Details of Conversion.** — However, it is the general rule that a plaintiff may, if he choose, recite the facts which he relies on as amounting to a conversion, or state the particular manner in which the conversion occurred. And his pleading will be held sufficient if the matters alleged fairly show that a conversion has occurred, even though a conversion is not formally charged.² But it is the usual practice that if a complaint or petition contain, in addition to a merely formal charge of conversion, a statement of the details or facts, the latter may be regarded as irrelevant matter or surplusage and may be stricken from the complaint. Thus, in an action for the seizure and conversion of a bag of gold coin, the complaint, after the usual and necessary averments as to the plaintiff's ownership and possession of the property, its value, and forcible seizure by the defendants, and its conversion to their use and his damage, proceeded to detail the manner in which the seizure was made, with the incidents occurring on the streets, and everything done by the plaintiff and the "crowd" relating to or constituting the evidence of the wrongful conversion. It was held that the narration of details should have been stricken from the complaint as irrelevant and redundant matter.³ So, where the allegation was that the defendant "unlawfully" took possession of the property and converted same, it was held, upon objection, that the word "unlawfully" would be treated as surplusage and be disregarded.⁴ It is said that it is perilous to attempt to allege the particulars as to the conversion, as where the plaintiff, instead of alleging merely that the defendant converted the property to his own use, undertakes to allege how the property was converted, the declaration or complaint

¹ *Stevens et al. v. Curran et al.*, 28 Mont. 366, 72 Pac. 753, quoting from *Daggett v. Gray*, *supra*. See *Goltra v. Penland*, 42 Ore. 18, 69 Pac. 925; *Florence et al. v. Helms et al.*, 136 Cal. 613, 69 Pac. 429.

² *Guest v. Neinly*, 92 Ia. 183; *Wilkinson v. Moseley*, 30 Ala. 562; *Battel v. Crawford*, 59 Mo. 215; *Thompson v. Vrooman*, 66 Hun 245.

³ *Green v. Palmer*, 15 Cal. 411, 76 A. D. 492.

⁴ *Nance v. Ga. Railway Co.*, 35 S. C. 307; see *Humpfner v. Osborne*, 2 S. D. 310; *Johnson v. Wabash Ry. Co.*, 22 Mo. App. 597.

will be bad where the facts alleged show that the defendant has not converted the property, and the facts averred will control a general averment that there was a wrongful conversion.¹

§ 508. **Whether Fraud should be Alleged.**—It is the general rule that if the defendant has procured the property by fraud or has otherwise fraudulently converted same, it is not necessary that the complaint or declaration set forth the fraud; as evidence of the fraud may be given under the general averment that the property was wrongfully converted by the defendant.² This rule has apparently been departed from in some instances. Thus, in an action of trover the Court of Appeals of California has said: "If it was necessary to prove fraud in this case, it was necessary to allege it. The defendant was entitled to know the facts upon which the plaintiff relied so that it might prepare itself to meet them. . . . The object of pleading is to arrive at the issue and give fair warning to the adversary. The issue to be tried in this case was as to whether or not the sale was procured by fraud." And the court held that to prove the fraud it was necessary for plaintiff to plead it.³ But the Supreme Court of California has expressly repudiated the doctrine as above announced from the Court of Appeals, and in a case of trover involving fraud, has said: "It is not correct to say in a case of the character before us that the plaintiff's cause of action rests upon fraud. It rests upon his ownership of the property, and the conversion thereof by the defendant, and fraud comes in only in reply to the defense that the defendant is the owner by reason of an alleged sale by the plaintiff. Technically, proof of fraud as to such sale was not a part of plaintiff's *prima facie* case, and was available only in reply to any claim of defendant's based on the sale, but this was a mere matter of order of proof. It is the general rule that in actions for the conversion of personal property, where the property has been procured by fraud, it is not necessary to allege the fraud, but it is sufficient to declare generally that the property was wrongfully converted."⁴ There is no doubt but that the holding of the Supreme Court is founded on the better reasoning.

¹ 21 Am. & Eng. Enc. L., 1080, citing: *Kendall v. Duluth*, 64 Minn. 295; *Glencoe Land Co. v. Hudson Bros. Co.*, 138 Mo. 439; *Parlin Co. v. Hanson*, 21 Tex. Civ. App. 401; *Baker v. Born*, 17 Ind. App. 422.

² *Beebe v. Knapp*, 28 Mich. 53; *Bliss v. Cuttle*, 32 Barb. 322.

³ *Virginia Timber Co. v. Glenwood Lbr. Co.*, (Cal. App.), 90 Pac. 48; and see: *Davis v. Robinson*, 10 Cal. 412; *Triscony v. Orr*, 49 Cal. 612; *Payne v. Elliott*, 54 Cal. 339, 35 A. R. 80.

⁴ *Wendling Lumber Co. v. Glenwood Lumber Co.*, (Cal.), 95 Pac. 1029, citing: *Salisbury v. Barton*, 63 Kan. 552, 66 Pac. 618; *Pekin Plow Co. v. Wilson*, 66 Neb. 115, 92 N. W. 176; *Hunter v. Hudson Ry. Co.*, 20 Barb. 493; *Benesch v. Waggner*, 12 Col. 534, 21 Pac. 706, 13 A. S. R. 254; *Jones v. Rahilly*, 16 Minn. 320.

§ 509. **Where Malice is Claimed.** — In jurisdictions where exemplary damages may be recovered for the conversion of chattels, if malice on the part of the defendant be relied on as a basis for the recovery of such damages, it must be pleaded by the plaintiff. But it is not essential that the word “malice” or “maliciously” be used, although such would be the better way. It has been held in a case against a sheriff for the wrongful levy of execution that malice was sufficiently pleaded by alleging that the acts of the sheriff “were done for the purpose of oppressing plaintiff and compelling him to surrender his property without receiving compensation therefor.”¹ And a complaint in an action for the conversion of property by attachment which alleges the willful and malicious taking of the property and the refusal to return same after repeated demands is sufficient as a basis for exemplary damages.²

§ 510. **Wrongful Taking by Defendant.** — Under the general allegation that the defendant converted the property to his own use, it may be shown that the conversion consisted of a wrongful taking.³ “In trover the manner of the taking is wholly immaterial; the injury complained of is the wrongful conversion; and the extent of the injury is measured by the value of the thing wrongfully converted by the defendant to his own use.”⁴ But it is said, however, that, *eo converso*, an allegation of a wrongful or tortious taking is equivalent to an allegation of a wrongful conversion and that it is unnecessary to plead any further particulars of the alleged conversion.⁵ But if the plaintiff undertakes to detail the facts relied upon to show defendant’s possession and in what manner he converted the property, it might then become important to allege how the defendant obtained possession, as his possession is not presumptively unlawful.⁶ But even here it is not sufficient to merely say that the defendant took the property “willfully and maliciously” and that he still retains part of it. Such facts might not amount to a conversion, and as the conversion is the gist of the action, this should be alleged, or at least sufficient should be alleged to show it.⁷ So where the complaint alleged that the defendant wrongfully sold and converted shares of stock in a corporation and the dividends on same, it was held sufficient

¹ *Greensburg v. Field*, 104 Ia. 599.

² *Shandy v. McDonald*, — Mont. —, 100 Pac. 203.

³ *Enos v. Bemis*, 61 Wis. 656.

⁴ *Graham v. Warner*, 3 Dana 146, 28 A. D. 65.

⁵ *Williams v. Stowell*, 5 Kan. App. 880, 48 Pac. 894; *Norman v. Horn*, 36 Mo. App.

419.

⁶ *Johnson v. Oregon S. N. Co.*, 8 Ore. 35.

⁷ *Triscony v. Orr*, 49 Cal. 612.

without charging the defendant with having wrongfully received the dividends.¹

§ 511. **Conditions Precedent to Action.** — If in the particular case there are conditions precedent to plaintiff's maintaining the action, proper allegations must declare the performance of these. Thus, if defendant holds a lien on property which the law requires to be paid off before the plaintiff is entitled to possession, it is a condition precedent that plaintiff tender the amount due under the lien; and, generally, plaintiff's pleading must allege such tender.² And where the defendant has committed larceny it is the rule in at least one state that trover will not lie until after a criminal prosecution for the larceny has been commenced. And under such rule it is essential in an action of trover that the plaintiff aver the institution of such criminal proceedings.³

§ 512. **Demand and Refusal.** — It has been shown in a previous chapter that a demand and refusal of possession of personal property do not amount to a conversion thereof, but that they are only evidence of a conversion.⁴ With this principle in mind, it will at once become apparent what is the proper rule of pleading when the plaintiff relies upon a demand and refusal of possession to show a conversion by the defendant. And this rule is that when an actual conversion is alleged in a complaint or declaration, either *in haec verba*, or by necessary intendment, it is wholly unnecessary to declare that prior to the institution of the action the plaintiff made demand for the property and that the defendant refused to surrender it.⁵ This rule is beyond question where the possession of the defendant was wrongful in its inception or where it is unnecessary to rely upon the fact of a demand and refusal in proving the conversion.⁶ But in case the possession was originally by right, and the law imposed upon plaintiff the duty of making demand for possession, it might seem at first thought as if the demand and refusal were a condition precedent to the accrual of the right of action and, in consonance with the general

¹ *Proctor v. Cole*, 66 Ind. 576. See, generally, *Schofield v. Whitelegge*, 49 N. Y. 1259, following statute.

² See the following cases: *Saltus v. Everett*, 20 Wend. 267, 32 A. D. 541; *Railroad Co. v. O'Donnell*, 49 Ohio St. 489, 34 A. S. R. 579, 21 L. R. A. 117; *Benoit v. Peguin*, 40 Vt. 199; *Robison v. Hardy*, 22 Ill. App. 512; *Stickney v. Allen*, 76 Mass. 352; *Warner v. Vallily*, 13 R. I. 483.

³ *Royce v. Oakes*, 20 R. I. 252.

⁴ *Ante*, § 91, *et seq.*

⁵ *Battel v. Crawford*, 59 Mo. 215; *Buntin v. Pritchett*, 85 Ind. 247; *Stewart v. Long*, 16 Ind. App. 164, 44 N. E. 63; *Sloan v. Lick Creek Co.*, 6 Ind. App. 584, 33 N. E. 997; *Johnson v. Ashland Lbr. Co.*, 45 Wis. 119; *Saratoga Co. v. Hazard*, 55 Hun 251, 121 N. Y. 677, 24 N. E. 1095; *Adams v. Castle*, 64 Minn. 505.

⁶ *Paige v. O'Neal*, 12 Cal. 483; *La Fayette Co. Bank v. Metcalf*, 40 Mo. App. 502; *Pease v. Smith*, 61 N. Y. 481; *Norman v. Horn*, 36 Mo. App. 419.

rule requiring a plaintiff to aver performance by him of all conditions so imposed upon him by law, it might further seem necessary that he should allege a demand for the property. But a further thought will bring to mind that the demand and refusal are evidence of the conversion, and the rules of pleading declare it improper to allege matters merely evidentiary. As was said in one case: "It would be strange indeed to hold a complaint for a wrongful conversion demurrable for lack of an allegation of demand and refusal, when it may not be necessary to prove a demand and refusal at all. And it would be quite as strange to hold that a demand and refusal must be pleaded in order to be proved. It would be the same as holding that any other evidence must be pleaded in order to be given at the trial. The contrary is suggested now and then, but only because a matter of evidence is inadvertently mistaken to be a rule of pleading."¹

§ 513. **Same Subject.** — In another case it was said: "A question of pleading presented by the record will be first noticed. That question arises upon the refusal of the court to give in charge to the jury an instruction, requested by the defendant below, to the effect that the action could not be maintained as one for conversion, because the petition failed to aver a demand for the property. It is contended that where the property of one person has lawfully come to the possession of another, a refusal by the latter to deliver it to the owner on his demand is necessary to constitute a conversion of it, and, therefore, the petition, in an action for its conversion, must contain an allegation of such demand and refusal. The allegation is not essential. A refusal to deliver the property on demand of the owner may show such an assumption of ownership or control of it as to afford satisfactory evidence of a conversion, but it is only evidence. The ultimate fact to be pleaded is the conversion; and in the actions of that nature, a petition with proper allegations of the plaintiff's ownership of the property, and of its value, avers that the defendant converted the property, states a cause of action."²

§ 514. **Same Subject.** — Again, the same rule has been worded as follows: "If the relation of the defendant to the property is such that a previous demand is essential in order to establish a conversion on his part, proof of such demand must be made at the trial, but the demand need not be alleged. The allegation that the defendants 'converted and disposed of the property to their own use,

¹ *Bernstein v. Warland*, 33 Misc. (N. Y.) 280.

² *Baltimore Ry. Co. v. O'Donnell*, 49 Ohio St. 489, 32 N. E. 476, 34 A. S. R. 579, 21 L. R. A. 117; see, also, *Schmidt v. Garfield Bank*, 64 Hun 298, 19 N. Y. Supp. 252, 138 N. Y. 631, 33 N. E. 1084; *Proctor v. Cole*, 66 Ind. 576; *Koehring v. Aultman*, 7 Ind. App. 475, 34 N. E. 30, 35 N. E. 30.

is the allegation of a fact sufficient, in the absence of a special demurrer, to sustain a judgment. Upon trial of an issue on this averment, the plaintiff would be at liberty to introduce evidence of a demand and refusal if such evidence were sufficient or necessary to establish the conversion, and he would also, under this averment, be authorized to offer evidence that the defendant had sold or otherwise dealt with the property in repudiation of the claim of the plaintiff.”¹ So, a complaint was held sufficient which charged the defendant with refusing to hand over money and notes in his possession and with having converted them to his own use, even though it was not averred that the money and notes were wrongfully and unlawfully appropriated by the defendant or that plaintiff had made a demand for them.²

§ 515. **Same Subject.** — However, in a case where it was alleged that the plaintiff furnished to the defendant an undertaker’s wagon for certain purposes, but the defendant had the wagon changed for other purposes, and converted it to his own use, it was held that the complaint stated no cause of action, since it failed to contain an averment that plaintiff had demanded possession.³ But such holding is unsound for at least two reasons: In the first place, there was a direct allegation that the defendant converted the property to his own use, which would admit evidence that the conversion consisted of a demand and wrongful refusal of possession. And in the second place there was an allegation of facts showing a distinct conversion, being the re-modeling of the wagon and putting it to a different use from that agreed upon, which was sufficient to recover regardless of a demand and refusal. But in another case which arose upon failure of a carrier to deliver goods transported by it, it was held that the complaint was fatally defective in failing to allege the day when a demand was made, it being argued, strange to say, that from all that appeared from the complaint, demand might have been made before the transportation of the property or before a reasonable time had elapsed since its transportation.⁴ It occurs to me that the fallacy of this holding is that it places upon plaintiff the burden of pleading evidence when a cause of action could be stated without it, and it was really matter to be set up by defendant in defense.

§ 516. **Allegation of Demand and Refusal must be Direct.** — It is the rule generally applied that where a plaintiff attempts to aver

¹ *Daggett v. Gray*, 110 Cal. 169, 42 Pac. 568; *Knipper v. Blumenthal*, 107 Mo. 665.

² *Reish v. Reynolds*, 68 Ind. 561.

³ *Kendall v. Duluth*, 64 Minn. 295, 66 N. W. 1150.

⁴ *Jeffersonville, etc. Ry. v. Gent*, 35 Ind. 39.

a demand and refusal as a statement of his cause of action, there must be a direct allegation that plaintiff demanded possession of the property itself and was refused by the defendant. As illustrating a failure in this respect, suit was brought for the value of certain material of which a fence had been built. Instead of alleging that prior to suit plaintiff had demanded a return of the material, he averred that he had demanded pay for it. In passing upon the sufficiency of this allegation, the court said: "He (plaintiff) alleges in his complaint that on the 14th day of January, after the defendant had sold the material of which the said fence had been composed, he demanded the pay for it which the defendant refused. He fails to support the allegation by any evidence, but he testifies, without any pleading to authorize or render material or competent such evidence, that in November, 1897, after he had built the new fence, at the time when Andrews began to remove the old fence, he claimed the wood composing the old fence, and demanded it of the defendant, which demand the defendant refused and claimed the material as his own." The court, consequently, held the evidence inadmissible under the allegation of such a demand.¹

§ 517. **Where Failure to Allege Demand is Waived.**— Even where there is a tendency to hold that an allegation of demand and refusal of possession is necessary in an action of trover, it is the rule that the absence of such allegation is immaterial if the defendant has by his conduct waived the right to object thereto. Thus, where it was alleged that the defendant converted certain property of which he was in possession as plaintiff's agent, it was held that a denial of the agency by the defendant rendered it unnecessary to allege and prove a demand before suit.² In another case the court said: "The first point raised by the appellant is that as the complaint does not allege any tortious or unlawful taking of the property by the defendant, the plaintiffs were bound to aver and prove a special demand and refusal before commencing the action; and a motion for a nonsuit was made on that ground and overruled. The case of *Paige v. O'Neal*, 12 Cal. 483, is very similar in many of its features to the present one. In that case, the court say: 'It was not essential to aver a demand of the defendant for the wheat in controversy in the complaint, or to prove a demand on the trial. If the property in

¹ *Hereford v. Pusch*, 68 Pac. 547 (Ari.); see: *Perry v. Musser*, 68 Mo. 477; *Watriss v. Pierce*, 36 N. H. 239; *Holdridge v. Lee*, 3 S. D. 134; *Williams v. Stowell*, 5 Kan. App. 880; *Moynahan v. Prentiss*, 10 Col. App. 295, 51 Pac. 94; *Howard v. Seattle Bank*, 10 Wash. 280, 38 Pac. 1040, 39 Pac. 100.

² *Becker v. Fiegenbaum*, 45 Pac. 837 (Cal.), citing: *Parrott v. Byers*, 40 Cal. 614; *Waddell v. Swann*, 91 N. C. 108.

fact belonged to the plaintiff — and it was upon this theory the suit is brought, and to this effect the evidence tended when the plaintiff rested — the seizure by the defendant was tortious; and it is a general rule that where the possession of property is originally acquired by a tort, no demand previous to the institution of suit for its recovery is necessary. It is only where the original possession is lawful, and the action relies on the unlawful detention, that a demand is required.' No objection was made by demurrer that a special demand was not averred in the complaint, but the defendant took issue upon all the averments. The jury found by their verdict that the property belonged to the plaintiff, and that it was in the defendant's possession. The defendant's claim was adverse to that of the plaintiff, and his possession was therefore unlawful from the beginning. He contested the plaintiff's claim or right to the property all through the action. If he had admitted in his answer the plaintiff's right to the property, and that he had always been ready to deliver up the property on demand, but no demand had been made, it might have been a question whether he could have been made to pay the costs of the action. But after contesting the title of the plaintiff through a litigated suit in which he claimed the title, he cannot escape the effects of an adverse verdict by an objection of this kind."¹

§ 518. **Time of Conversion.** — In the few cases in which has been presented the question as to the necessity of alleging the time of the conversion in an action of trover, there seems to be a diversity of opinion. The New Jersey courts have announced the doctrine that the time of the supposed conversion is material and must be alleged, although they say that it is not essential that the true time be stated.² In one case they held the allegation that the conversion occurred "some time last fall, say September or October", an insufficient allegation of time.³ But the current of authority runs against this doctrine. It is the rule of most courts that time is not an essential element of the cause of action, and therefore that an allegation thereof is not necessary.⁴ The only reason that time might become material might be that the statute of limitations would become

¹ *Sargent v. Sturm*, 23 Cal. 359, 83 A. D. 118; see *Snyder v. Baber*, 74 Ind. 47.

² *Glenn v. Garrison*, 17 N. J. L. 1.

³ *Mount v. Cubberly*, 19 N. J. L. 124; *Gaskill v. Barbour*, 62 N. J. L. 530; *Robinson Co. v. Rilpe et al.*, 138 Pac. 910, — Nev. —.

⁴ *Richardson v. Hall*, 21 Md. 399; *Bryden v. Croft*, (Tex. Civ. App.), 46 S. W. 853; *Gerard v. Jones*, 78 Ind. 378; *Peacock v. Feaster*, 51 Fla. 269, 40 So. 74; *Leon v. Kerrison*, 47 Fla. 178, 36 So. 173; *Hunt v. Hummel*, 142 Cal. 456, 76 Pac. 378; *West. Min. Co. v. Quinn*, — Mont. —, 105 Pac. 732; *Lowe v. Ozmun*, 137 Cal. 257, 70 Pac. 87; *Dietus v. Fuss*, 8 Md. 148.

involved and it would be necessary to determine whether the action was barred. But this reason is swept away when we remember that the statute of limitations is defensive matter to be set up and relied on by the defendant.¹ It has been held, however, that if the time be alleged it must be proved with certainty.² In an action for the conversion of timber from wild lands alleged to have extended over a considerable period of time, an allegation that the conversion took place "at different times during the year 1903, subsequent to March 11th, thereof, 1904, 1905, and 1906, the exact dates being unknown to plaintiff" was held sufficiently specific as to time as against a demurrer on that ground.³ The court said: "Pleadings should be reasonably certain as to time. In actions of trover, an averment of the precise time of the conversion is not necessary, but it is necessary to state that it was some time prior to the commencement of the suit and within the statutory limitation in which the action can be brought. At common law it was held that it was not important that the true time of conversion should be alleged in the complaint.⁴ This court, however, has held that, if a given and certain date is alleged, it must be proven.⁵ This being true, and the complaint averring that the exact date was unknown to plaintiff, it is probable that the plaintiff could not make the averment more certain as to the time of the conversion without unduly jeopardizing his right to recover, though he unquestionably proved a conversion within the statutory period, but was unable to prove the exact date thereof, whether as alleged or any other date, so that the complaint could be amended in this respect to meet the proof in accordance with the statute allowing such amendment." But the same court had previously held that if the complaint failed to aver any time as to the alleged conversion it would be insufficient and subject to demurrer on that ground.⁶

A complaint alleging the conversion to have taken place on or about a certain date has been held sufficient to support a judgment for plaintiff where the evidence tended to show the conversion to have occurred three days later than the date stated.⁷ But where the conversion was charged as covering a period of thirteen years, without any specific date being stated, the court held that the complaint should be made more definite in its allegations as to

¹ *Hixon v. Pixley*, 15 Nev. 475; *George v. Graham*, 1 Phila. 69.

² *Williams v. McKissack*, 125 Ala. 544, 27 So. 922; *Mobile Ry. Co. v. Bay Shore Lumber Co.*, 158 Ala. 622, 48 So. 377.

³ *Corona Coal Co. v. Bryan et al.*, 171 Ala. 86, 54 So. 522, Ann. Cas. 1913A 878.

⁴ 31 Enc. Pl. & Pr. 1077.

⁵ *Williams v. McKissack*, *supra*.

⁶ *Tallassee Falls Co. v. Alexander, etc. Bank*, 159 Ala. 315, 49 So. 246.

⁷ *Blair v. Riddle*, 3 Ala. App. 292, 57 So. 382.

time.¹ So, under the rule that pleadings will be construed more strictly against the pleader, it has been held that where there is no allegation as to the time when plaintiff became entitled to possession of the property, it will be presumed that the damage occurred prior to the time when the plaintiff was entitled to possession.²

§ 519. **Joinder of Causes of Action.** — Trover is an action *ex delicto*. Being such, the general rule is applicable that a cause of action for a conversion cannot be joined with one involving a contractual liability. This is true at common law,³ as well as under the codes.⁴ Thus, it was held that the plaintiff could not in one action sustain a count for goods sold and one for damages from another person who was alleged to have fraudulently colluded with the buyer and taken possession of the goods.⁵ And a count for the conversion of money cannot be joined with one for a breach of contract to re-deliver the money.⁶ Neither can a claim for the recovery of freight charges paid to a carrier be joined with one for the conversion of the same goods.⁷ Nor can the plaintiff recover by joining a count in trover with one on a simple contract for a stated consideration to pay money.⁸ And, in general, it is improper to join counts in assumpsit with those founded on a conversion.⁹ Likewise, it is not permitted to join a claim for conversion with book account.¹⁰

§ 520. **Illustrations of Same Subject.** — Without any attempt at a definite arrangement, I will give some instances where the joinder of other causes of action with a count in trover has, and where it has not, been held proper. Thus, a claim for conversion may be joined with one for false representations inducing the purchase of personal property.¹¹ So, it has been held permissible to join a cause of action in trover with one alleging that a bond conditioned for the payment of the sum of money had been obtained from plaintiff by false pretenses.¹² Or a claim for the value of coal taken from land may be

¹ *Mut. Life Ins. Co. v. Raymond*, 118 App. Div. 828, 103 N. Y. S. 839.

² *Triscony v. Orr*, 49 Cal. 612.

³ *Louisville, etc. Co. v. Brinkerhoff*, 119 Ala. 528, 24 So. 885; *Bull v. Mathews*, 20 R. I. 100, 37 Atl. 536; *Gary v. Abington Co.*, 94 Va. 775, 27 S. E. 595; *Clapp v. Campbell*, 124 Mass. 50.

⁴ *Stark v. Wellman*, 96 Cal. 400, 31 Pac. 259; *Adams v. Bissell*, 28 Barb. 382; *Bixel v. Bixel*, 107 Ind. 534; *Southworth Co. v. Lamb*, 82 Mo. 242.

⁵ *Parker v. Rodes*, 79 Mo. 88.

⁶ *Stark v. Wellman*, *supra*. See *Loup v. Cal. etc. Ry. Co.*, 63 Cal. 97.

⁷ *Woodbury v. Deloss*, 65 Barb. 501.

⁸ *Little v. Gibbs*, 4 N. J. L. 240.

⁹ *Mobile Ins. Co. v. Randall*, 74 Ala. 170; *Polhemis v. Annin*, 1 N. J. L. 176; *Howe v. Cook*, 21 Wend. 29; *Beasley v. Bradley*, 2 Swan 180 (Tenn.).

¹⁰ *Broadwell v. Conga*, 2 N. J. L. 137.

¹¹ *Cleveland v. Barrows*, 59 Barb. 364.

¹² *Silver v. Holden*, 50 N. Y. Super. Ct. 236.

joined with one for damages to the land itself;¹ and a count in trover with one in replevin;² and one in trover with one in case.³ Thus it has been held that the plaintiff may join a count in case for defendant's negligence in failing to properly care for the property intrusted to him and a count for the conversion of the property;⁴ or a claim for negligence against a carrier and one for conversion.⁵ So, claims in trover and case may be joined where the defendant has committed waste,⁶ or has been guilty of fraud.⁷

§ 521. **Same Subject.** — But it is said that a count in trover cannot be joined with one for trespass *vi et armis* if, under the particular practice, the judgments entered in the two actions are different.⁸ But it is otherwise where the same judgment may be rendered in the two forms of action.⁹ It has been held improper to join a count in trover with one under a statute providing a penalty for cutting trees, because such counts were not for the same cause of action under a statute providing that counts in trespass and trespass on the case, including trover, could be joined.¹⁰ But a plaintiff may in one count recover for different conversions by defendant.¹¹

§ 522. **Splitting of Actions.** — A party having a cause of action for personalty taken or converted at one time must bring his action for the whole of the property or for damages for the conversion of the whole. If he elect to sue for damages for a part, when he might have sued for the conversion of the whole, his right of recovery for the remainder will be barred by the first action.¹² Or, as it has been expressed, a plaintiff cannot carve two suits out of one cause of action. So, where the plaintiff's team was stopped by the defendant and a horse taken therefrom, it was held that the plaintiff could not bring

¹ *Devin v. Walsh*, 108 Ia. 428, 79 N. W. 133.

² *Lewis v. Galena Co.*, 40 Ill. 281; *Mulheiser v. Lane*, 82 Ill. 117; *Karr v. Barstow*, 24 Ill. 580.

³ *McConnell v. Leighton*, 74 Me. 415; *Wait v. Kellogg*, 63 Mich. 138, 30 N. W. 80; *Hayes v. Mass. Ins. Co.*, 125 Ill. 626, 18 N. E. 322, 1 L. R. A. 303; *Ferrier v. Wood*, 9 Ark. 85; *Henry v. Allen*, 93 Ala. 197, 9 So. 579; *Ayer v. Bartlett*, 9 Pick. 156; *Patterson v. Anderson*, 40 Pa. St. 359, 80 A. D. 579; *Hood v. Maxwell*, 1 W. Va. 219.

⁴ *McCahn v. Hirst*, 7 Watts (Pa.) 175.

⁵ *So. Ex. Co. v. Palmer*, 48 Ga. 85; see *Loeffler v. Keokuk Co.*, 7 Mo. App. 185; *Hawkins v. Hoffman*, 6 Hill 586, 41 A. D. 767 (N. Y.).

⁶ *Harris v. Goslin*, 3 Harr. (Del.) 340.

⁷ *Beebe v. Knapp*, 28 Mich. 57.

⁸ *Crenshaw v. Moore*, 10 Ga. 384; *Haines v. Beach*, 90 Mich. 563, 51 N. W. 644; *Mecklin v. Deming*, 11 Ala. 159, 20 So. 507; *Hunt v. Pratt*, 7 R. I. 586.

⁹ *Williams v. Bramble*, 2 Md. 313; *Lippman v. Myers*, 53 N. J. L. 21.

¹⁰ *Keyes v. Prescott*, 32 Vt. 86; *Templeton v. Cloyston*, 59 Vt. 628, 10 Atl. 594.

¹¹ *Skeen v. Engine Co.*, 42 Mo. App. 158.

¹² *Fireman's Ins. Co. v. Cochran*, 27 Ala. 228; *Simes v. Zane*, 24 Pa. St. 242; *Union, etc. Co. v. Trampe*, 59 Mo. 355; *Kaehler v. Dobberpuhl*, 60 Wis. 256, 18 N. W. 841; *McCaffrey v. Carter*, 125 Mass. 330; *Bullard v. Thorpe*, 86 Vt. 599, 30 Atl. 36.

trover for the horse taken, and trespass for stopping the team and delaying his journey, because it was all one act.¹ And it has also been held that where a recovery has been had in replevin for a part of the property, a further action for the remainder, either in replevin for the recovery of the articles, or in trover for their value, is barred.² But it was said in one case that where a portion of the chattels cannot be replevied because the defendant has concealed or destroyed such portion, the plaintiff may replevy that part of the chattels which may be found, and maintain a separate action to recover the value of that which was thus put beyond the reach of replevin.³ And one court, with apparently more leniency for the carelessness of counsel, than a regard for the propriety or enforcement of correct rules of pleading and procedure, has held that where in an action of trover for the conversion of personalty a part of the property is left out through inadvertence on the part of the solicitor who drew the bill, the plaintiff may maintain another action for the value of the remainder of the property.⁴ And a second action has been permitted where the plaintiff, prior to judgment in the first action, was ignorant of the full extent of his wrongs.⁵

§ 523. **Amendments of Complaints.** — Trial courts have a wide discretion in permitting amendments of complaints or declarations for conversion where the original allegations are informal or even insufficient, and, unless this discretion has been grossly abused, appellate courts will not interfere.⁶ The only real limitation upon the power of courts to allow amendments, under the modern system of judicial procedure which looks to the substance rather than the form, is that the amendment shall not introduce an entirely new cause of action.⁷ Amendments have been permitted under a variety of circumstances, some of which will be noted. Thus, an amendment was permitted to show that the goods were willfully and maliciously taken.⁸ And where the defendant was improperly described as the Rome Railroad, an amendment was permitted describing it

¹ *Hite v. Long*, 6 Rand. 457, 18 A. D. 719.

² *Hardin v. Palmerlee*, 28 Minn. 450, 10 N. W. 773; *Karr v. Barstow*, 24 Ill. 580; *Moran v. Blankington*, 65 Mo. 337; *Farwell v. Meyers*, 59 Mich. 179, 26 N. W. 328.

³ *Bennett v. Hood*, 1 Allen (Mass.) 47, 79 A. D. 705; *Reid, etc. v. Ferris*, 112 Mich. 693, 71 N. W. 484, 67 A. S. R. 437.

⁴ *Yancey v. Stone*, 9 Rich. Eq. (S. C.) 429.

⁵ *Funk v. Funk*, 35 Mo. App. 246; *Risley v. Squire*, 33 Barb. 280.

⁶ *Lovell v. Hammond*, 66 Conn. 500; *Hamlin v. Carruthers*, 19 Mo. App. 567; *Howard v. Seattle Bank*, 10 Wash. 280, 38 Pac. 1048, 39 Pac. 100; *Nickerson v. Bradbury*, 88 Me. 593; *King v. Wright*, 77 Ga. 581; *Crane Lumber Co. v. Bellows*, 116 Mich. 304; *France v. Orvis*, — Ia. —, 75 N. W. 660.

⁷ *Parker v. Rodes*, 79 Mo. 88; *Winder v. Bank*, 2 Pa. St. 446; *Scovill v. Glasner*, 79 Mo. 449; *Pridgin v. Strickland*, 8 Tex. 427, 58 A. D. 124.

⁸ *Wilde v. Hexter*, 50 Barb. 448.

as the Rome Railroad Company.¹ And where defendant was sued as trustee, plaintiff was allowed to strike out the word trustee and thus render the action one against the defendant personally,² and it was held that such did not constitute a new cause of action. So, generally an amendment will be permitted where there has been a mis-joinder of parties.³ Thus, where the plaintiff was able to prove a conversion by only one of several of the defendants, it was held that he should be permitted to strike out the names of those against whom he had no proof.⁴ In fact, an amendment may be permitted to cure almost any defect in the complaint or declaration, as inserting an allegation of demand;⁵ or making an allegation of demand more certain;⁶ alleging a new time and place when and where possession was obtained by the defendant;⁷ setting out the value of the property alleged to have been converted;⁸ increasing the amount of the damage claimed;⁹ and changing the description of the property.¹⁰

§ 524. **Amendments Allowable.** — An allegation as to the subject-matter of the supposed conversion has also been permitted to be changed. Thus, in an action brought for a conversion of certain cattle, and in the trial of which it appeared that the defendant did not in fact sell the cattle in question, but that they were sold by another under the direction of the defendant and who knowingly received the proceeds of the sale and converted them, it was held no error for the District Court, before a second trial of the action, to permit the plaintiff to so amend his petition as to charge the defendant with a conversion of the proceeds of the sale.¹¹ So, it has been held proper to permit the plaintiff to add a count in case;¹² although an application to amend by adding a cause of action for fraud and deceit was denied.¹³ And where the original action was

¹ Rome Ry. Co. v. Sullivan, 14 Ga. 277.

² Maxwell v. Harrison, 8 Ga. 61, 52 A. D. 385.

³ Parker v. Chambers, 24 Ga. 518.

⁴ Cooper v. Blair, 14 Ore. 255.

⁵ Hulbert v. Brackett, 8 Wash. 438, 36 Pac. 264.

⁶ Howard v. Seattle Bank, 10 Wash. 280, 38 Pac. 1040, 39 Pac. 100.

⁷ Nash v. Adams, 24 Conn. 33; Waverly Tober Co. v. St. Louis Co., 112 Mo. 383; Tools v. Americus, etc. Co., 54 Ga. 497.

⁸ Horneffer v. Duress, 13 Wis. 603.

⁹ Altes v. Hinckler, 36 Ill. 275.

¹⁰ Randlette v. Judkins, 77 Me. 114, (52 A. R. 747); Worsham v. Vignal, 14 Tex. Civ. App. 324; see Nickerson v. Bradbury, 88 Me. 593.

¹¹ Emporia Nat'l Bank v. Layfeth, 63 Kan. 17, 64 Pac. 973, referring to the Michigan case of Nugent v. Adsit, 53 N. W. 620, in which it was alleged that the defendant converted "953 bushels of wheat, \$1040", and it was held that the declaration could not be amended by striking out that item and inserting in lieu thereof "31 acres of growing wheat, \$800." See Van de Harr v. Van Domesler, 56 Ia. 671, 10 N. W. 227.

¹² Phillips v. Brigham, 26 Ga. 617, 71 A. D. 227.

¹³ Parker v. Rodes, 79 Mo. 88.

case, a count in trover was permitted to be added;¹ and the same where the original action was replevin;² or trespass.³

§ 525. **Same Subject.** — But where a husband had brought trover for a conversion of his wife's separate property, it was held that the defect of parties was not amendable.⁴ And in permitting amendments, the courts distinguish between cases where there is simply a variance between the original allegations and the proof and those cases where there is a failure of proof. As was said in one case: "If the evidence had proved a conversion of the property by some act of the defendant other than that alleged in the complaint, it would have been a variance and amendable under the code. But as it tended to establish a cause of action entirely different and distinct from the one alleged and to disprove wholly the latter, it was just the case of failure of proof of the allegation of the cause of action. Although forms of action are abolished by the code, causes of actions are not. They remain distinct and distinguishable as they ever were, and ever must be while legal rules regulate the conduct and dealings of men with each other."⁵ And in another case brought by a going partnership to recover damages for the conversion of personal property belonging to it, the petition was declared not to be amendable so as to wholly abandon the action of the partnership and the cause of action stated in the petition, and state a cause of action in favor of one of the members of the dissolved partnership for an accounting of the partnership business between such member and the defendant.⁶

§ 526. **Demurrer.** — In an action of trover for the conversion of chattels, a demurrer to the complaint or petition serves the same purpose as in any other action. It will lie for any of the causes specified in the code. But objections will not be allowed when presented by demurrer when the appropriate proceeding is to move to make the defective pleading more definite and certain.⁷ And a demurrer is not proper where the allegations are confused and obscure.⁸ And in a case in another state a complaint was demurred to on the ground that its allegations were ambiguous, unintelligible and uncertain in that there was no proper description of the property involved. But the court overruled the demurrer. The objection

¹ *So. Ex. Co. v. Palmer*, 48 Ga. 85.

² *Mulheisen v. Lane*, 82 Ill. 117; *Nelson v. Bowne*, 15 Ill. App. 477.

³ *Benton v. Beattie*, 63 Vt. 186.

⁴ *Taylor v. Jones*, 52 Ala. 78.

⁵ *Moore v. McKibbin*, 33 Barb. 246, quoted in *Woods Mach. Co. v. Woodcock*, 86 Pac. 570, — Wash. —.

⁶ *Thompson v. Beeler*, 69 Kan. 462, 77 Pac. 100.

⁷ *Howard v. Seattle Bank*, 10 Wash. 280; *Kalckhoff v. Zoehrlant*, 40 Wis. 427.

⁸ *Hurst v. Mellinger*, 73 Tex. 189.

should have been taken by special exceptions or a motion to make the complaint more definite and certain.¹

§ 527. **Answer; General Denial.** — Under the code system of pleading, a defendant sued in trover may set forth in his answer as many defenses as he may have, whether they be entire or partial, the limitations being that the defenses relied upon must not be inconsistent. The common law system is much narrower, for under it pleas in trover are either general or special, the general plea being “not guilty” by which an issue is raised as to plaintiff’s title, right of possession, and the act of conversion; and the special plea being a confession of a former right of action in plaintiff, but avoiding his right of recovery by a plea of some matter of release, or the bar of the statute. Greenleaf says:² “The defence of this action, in the United States, when it does not consist of matters of law, is almost universally made under the general issue of *not guilty*; a special plea in trover being as seldom seen here as it was in England under the old rules of practice. And though in the latter country this plea is now held and perhaps wisely to put in issue only the fact of conversion, and not its character as rightful or otherwise, nor any other matter of inducement in the declaration, such as the title of the plaintiff, nor any matter of the title or claim of the defendant, or of any subsequent satisfaction or discharge of the action; yet in this country, as formerly in England, this plea still puts the whole declaration in issue. Under it, therefore, the defendant may prove, by any competent evidence, that the title to the goods was in himself, either absolutely, as general owner, or as joint-owner with the plaintiff, or specially, as bailee, or by way of lien; or that he took the goods for tolls, or for rent in arrear; or he may disprove the plaintiff’s title by showing a paramount title in a stranger or otherwise; or he may prove facts showing a license; or a subsequent ratification of the taking; or that the plaintiff has discharged other joint parties with the defendant in the wrongful act complained of. It has been said that a release is the only special plea in trover, but the statute of limitations, also, is usually pleaded specially; and indeed there seems to be no reason why the same principle should not be admitted here, which prevails in other actions, namely, that the defendant may plead specially anything which, admitting that the plaintiff had once a cause of action, goes to discharge it.”

§ 528. **Same Subject.** — It is the rule that anything that tends to controvert directly the allegations of the complaint may be shown

¹ Greenbaum v. Taylor, 102 Cal. 624; Lake Shore Co. v. Hutchins, 37 Ohio St. 282.

² 2 Greenleaf, Evidence, § 648.

under a general denial; and it is further the rule that a general denial puts in issue only the facts alleged in the complaint.¹ And under the New York code it has been held that in a suit for the conversion of property a denial of each and every allegation of the complaint puts in issue the conversion and plaintiff's title.² So, the defendant need not plead as an affirmative defense that he owned the property at the time the action of trover was commenced, nor allege how he obtained title; as such matters may be shown under a general denial of plaintiff's ownership.³ It is said that a denial of the alleged conversion is equivalent to a plea of the general issue.⁴ The rule as to what may be shown under a general denial has been stated thus: "Keeping in view the logical rule that the new facts which may be proved under a denial are those which show that the plaintiff's statements are untrue, also that facts which are consistent with their truth, but show that he has no cause of action, are new matter, to be pleaded, we can seldom be deceived as to what may and may not be thus proved."⁵

§ 529. **Same Subject.** — And the same principle has been more elaborately expressed as follows: "The overwhelming weight of judicial opinion has with almost complete unanimity agreed upon the principle which distinguishes denials from new matter, and determines the office and functions of each. The general denial puts in issue all the material averments of the complaint or petition, and permits the defendant to prove any and all facts which tend to negative those averments or some one or more of them. Whatever fact, if proved, would not thus tend to contradict some allegation of the plaintiff's first pleading, but would tend to establish some circumstance or transaction, or conclusion of fact inconsistent with the truth of all of those allegations, is new matter. It is said to be 'new' because it is not embraced within the statements of fact made by the plaintiff; it exists outside of the narrative which he has given; and proving it to be true does not disprove a single averment of fact in the complaint or petition but merely prevents or destroys the legal conclusion as to the plaintiff's rights and the defendant's duties which would otherwise have resulted from all those averments ad-

¹ *Johnson v. Oswald*, 38 Minn. 550, 38 N. W. 630, 8 A. S. R. 698, citing *Bond v. Corbett*, 2 Minn. 209.

² *Robinson v. Frost*, 14 Barb. 536; *Beaty v. Swartout*, 32 Barb. 293; *Jacobs v. Remsen*, 12 Abb. Pr. 390; *Young v. Glasscock*, 79 Mo. 577; *Thomas v. Ramsey*, 47 Mo. App. 84.

³ *Brevoort v. Brevoort*, 40 N. Y. Super. Ct. 211; *Kirk v. Kane*, 87 Mo. App. 274; *Crane v. McGuire*, 64 S. W. 942 (Tex. Civ. App.); *Stanbach v. Rexford*, 2 Mont. 565.

⁴ *Fenalsou v. Rackliff*, 50 Me. 362.

⁵ *Bliss*, Code Pleading, § 330.

mitted or proved to be true. Such is the nature of the new matter which cannot be presented by means of a denial, but must be specially pleaded so that the plaintiff may be informed of its existence and of the use to be made of it by the defendant.”¹

§ 530. **Illustrations under General Denial.** — Having thus stated the general principle to be observed in determining whether a proposed defense is to be pleaded as new matter or whether it may be shown under a general denial, I will give a few instances in which the rule has been applied in actions of trover. Thus, where plaintiff alleged his ownership and possession and that the property was taken by the defendant, it was held that under a general denial the only issue was as to plaintiff's ownership and the taking by defendant.² And where plaintiff, claiming under a chattel mortgage, sued the creditors of the mortgagor for a conversion of the mortgaged property, it was held that under a general denial the defendant might show that as to them the mortgage was fraudulent.³ In such cases the effect is to show that a cause of action never existed in favor of plaintiff. And where plaintiff had pledged to defendant the property involved, the defendant, in an action against him for the conversion of the property, was permitted to show under a general denial that the amount which plaintiff had tendered to him as payment of the principal debt was insufficient to discharge the pledge lien.⁴ Likewise, where plaintiff claimed title to the property through a sale to him by the defendant, the latter was permitted to show under a general denial that the sale was void on account of fraud.⁵ And in this action it has been held that the defendant under the general issue may show that the property had been taken and condemned under a public statute.⁶ It would seem, however, that such a defense would be in the nature of a justification and more properly new matter. Where the defendant denied the conversion, evidence was admitted as to whether, at the time demand was made upon defendant, the property was in his possession or whether it had been lost without his fault.⁷

§ 531. **What Admitted by General Denial.** — It is said in general that where the plea of “not guilty” is employed, it admits all defenses except the statute of limitation, releases and other matters

¹ Pomeroy's Code Remedies, 567, and cases cited.

² *Pico v. Kalisher*, 55 Cal. 153.

³ *Hardwick v. Cox*, 50 Mo. App. 509. And to the same effect, see *Eureka, etc. Works v. Bresnahan*, 66 Mich. 489, 33 N. W. 834.

⁴ *Jones v. Rahilly*, 16 Minn. 320.

⁵ *Johnson v. Oswald*, 38 Minn. 550, 38 N. W. 630, 8 A. S. R. 698.

⁶ *Knapp v. Miller*, 133 Pa. 275, 19 Atl. 555.

⁷ *Willard v. Giles*, 24 Wis. 319.

of discharge.¹ But under the Hilary rules,² it is said the plea of "not guilty" operates as a denial of the conversion only and admits title and ownership in plaintiff.³ And while it has been said that under the code there is, strictly speaking, no general issue,⁴ yet it is conceded practically on all sides that a denial of all the allegations of the complaint puts in issue the title or right of possession of plaintiff, the fact of possession, and the damage to plaintiff; and in trover these are the material matters which plaintiff must show in order to recover. And, as has been shown, any item of evidence is admissible under a general denial which tends to prove untrue either of these allegations. Thus, where suit was brought for attorney's fees, the defendant in a counter-claim alleged the conversion by plaintiff of certain moneys which he had collected for defendant. Under a general denial in his reply, the plaintiff was permitted to show that it had been agreed between the parties that the money so collected by plaintiff was to be applied on another debt which defendant owed plaintiff.⁵ Likewise in an action for the conversion of moneys collected, defendant was allowed to show, without specially pleading it, that an agreement of agency existed between the parties by which the defendant was entitled to retain the money.⁶ And it has been held, as it seems to me improperly, that where the defendant had seized the property as an excise officer of the Federal government he could show, under a general denial, the act of Congress under which he proceeded.⁷ But where title and possession had passed to a vendor, a third person who had converted the property was not permitted to show under a general denial that the sale was fraudulent.⁸

§ 532. Attacking Plaintiff's Ownership or Right of Possession. — The rules of the common law and under the code are alike in the latitude allowed a defendant in attacking the title of plaintiff or his right of possession under a general denial. Such general denial, it is usually held, puts these matters squarely in issue, and permits evidence of anything that overcomes the effect of these allegations.⁹ So, upon the issue thus raised, the defendant may prove

¹ *Vaden v. Ellis*, 18 Ark. 355.

³ 1 Chitty, Pleading, 530.

² Stat. 3 & 4. Wm. IV, C. 42, § 1.

⁴ *Dyson v. Ream*, 9 Ia. 51.

⁵ *Wilder v. N. Y. Bank Note Co.*, 16 Misc. 355, 38 N. Y. Supp. 75.

⁶ *Phoenix, etc. Ins. Co. v. Walrath*, 53 Wis. 669, 10 N. W. 151.

⁷ *Author v. Wilson*, 16 Ky. 76; *Coolidge v. Guthrie*, Fed. Cas. No. 3,185.

⁸ *Keating Co. v. Terre Haute Co.*, 11 Tex. Civ. App. 216, 32 S. W. 556; *Wehle v. Butler*, 43 How. Pr. 5, 12 Abb. Pr. n. s. 139.

⁹ *Clelland v. Nichols*, 24 Minn. 176; *Hart v. Hart*, 48 Mich. 175; *Fields v. Brice*, 108 Ala. 632; *Pryor v. Portsmouth Co.*, 6 N. Mex. 44, 27 Pac. 327; *Hurst v. Cook*, 19 Wend. 463; *Blakey v. Douglas*, — Pa. —, 6 Atl. 398; *Winlack v. Geist*, 107 Pa. St. 297.

by any competent evidence that the title to the property was in himself either as general owner or specially.¹ Likewise, the defendant may show that title to the property involved is in a third person.²

§ 533. **Same Subject.** — In an action by an administrator against a person claiming to hold the decedent's property by virtue of a gift or transfer from the decedent, if the defendant in his answer denies that the plaintiff's intestate, at the time of his death, owned or was in possession of the property, he may on the trial claim or establish a title to the property by gift from the intestate; especially after the plaintiff has himself proved that the defendant had claimed the property as such.³ And since it is necessary that the plaintiff show that his possession, which the defendant is charged with disturbing, was rightful, the defendant may, under a general denial, show that the title under which plaintiff claimed possession was void as against defendant.⁴ Thus, the maker of a note, upon its being presented to him for payment by an agent of the payee, refused to re-deliver it on the ground that it had been fraudulently obtained from him for property which had no value. In an action of trover against him for the conversion of the note, it was held that under the general denial could be shown the original fraudulent possession by plaintiff.⁵ And on like principle, in an action for the conversion of personal property, it is held that a claim by the defendant that a third person is the owner of the property is not new matter to be specially pleaded. It only amounts to a traverse and proof of it merely disproves title in the plaintiff which the latter is bound to establish in the first instance.⁶

§ 534. **Denial of Act of Conversion.** — A general denial puts in issue the conversion of the goods; so that thereunder the defendant may prove any fact showing or tending to show that there was no

¹ Schoenrock v. Farley, 49 N. Y. Super. Ct. 302; Kirk v. Kane, 87 Mo. App. 274.

² Vanderburgh v. Bassett, 4 Minn. 242; McLaughlin v. Harriott, 14 Misc. 343, 35 N. Y. Supp. 684; Robinson v. Peru Plow Co., 1 Okla. 140, 31 Pac. 988; Davis v. Hoppeck, 13 N. Y. Super. Ct. 254; Sparks v. Heritage, 45 Ind. 66; Emerson v. Thompson, 59 Wis. 619, 18 N. W. 503; Smoot v. Cook, 3 W. Va. 172, 100 A. D. 741; see, however, Krewson v. Purdon, 13 Ore. 563; Anderson v. Agnew, 38 Fla. 30; Stewart v. Mills, 18 Fla. 57; Patterson v. Clark, 20 Ia. 429.

³ Woodruff v. Cook, 25 Barb. 505, cited in Estee's Pleading, § 3706; Manning v. Maytubby, — Okla. —, 141 Pac. 781.

⁴ Swope v. Paul, 4 Ind. App. 364, 31 N. E. 42.

⁵ Graham v. Warner's Ex., 3 Dana 146, 28 A. D. 65; Coffin v. Anderson, 4 Blackf. (Ind.) 395.

⁶ Krewson v. Purdom, 13 Ore. 563, 11 Pac. 281; Hopkins v. Dipert, 11 Okla. 630, 69 Pac. 883, approved in Manning v. Maytubby, — Okla. —, 141 Pac. 781, citing: McGrew v. Armstrong, 5 Kan. 284; Bridges v. Paige, 13 Cal. 640; Jones v. Frum, 26 Neb. 76, 42 N. W. 283; Johnson v. Pennell et al., 67 Ia. 669, 25 N. W. 874; Griffin v. Railway Co., 101 N. Y. 348, 4 N. E. 740; Bliss, Code Pleading (3d ed.), 325 et seq.

conversion.¹ Thus, it may be proven under a general denial that the taking of the goods by the defendant was by permission of the plaintiff and according to an agreement between the parties.² And where the defendant's plea was a general denial, it was contended that such plea denied a mere taking and was no denial of a wrongful taking; but the court held otherwise.³ In another case the answer was in two paragraphs — one of which was a general denial, and the second was an admission that the defendant received the property but failed to deliver it to the plaintiff for the reason that it had been taken from him under a writ of replevin. A demurrer was sustained to the second paragraph on the ground that such defense could be shown under the general denial.⁴ An Alabama case was prosecuted for the value of an animal killed by the health officer of a city, and the defendant's plea was a general denial. Relative to the sufficiency of this plea, the court said: "In trover a valid authority for appropriation or destruction of property involved may be proven under the general issue and in bar of the action."⁵ In Gould on Pleading § 57, it is laid down that 'as the conversion, which is the gist of the action in trover, is *ex vi termini* a tortious act which cannot in law be justified or excused, it is manifest that any plea alleging matter of justification or excuse (as a license from the plaintiff — an authority derived from the law, etc.) is equivalent to the plea of not guilty, since it must involve a denial of the conversion.' There are decisions opposed to the admission of such a defense without a special plea, and the question seems not to have been expressly decided by this court, though as favoring the rule we announce there is an intimation in *Hopkinson v. Shelton*, 37 Ala. 306, where in passing on a plea setting up that the property alleged to have been converted was taken under execution, the court said that in view of our statute allowing a plurality of pleas, 'it was no objection to the second plea that it amounted to the general issue.' A conversion is necessarily wrongful and cannot be justified. Where the appropriation is rightful, there is no conversion; therefore a plea showing that fact directly contravenes the complaint and is not in confession and avoidance or in justification. Under the pleading in the present case it was competent under the count in trover, and in bar of it,

¹ *Nichols Co. v. Thresher Co.*, 70 Minn. 528, 73 N. W. 415; *Searcy v. State*, 93 Ind. 556; *Stewart v. Mills*, 18 Fla. 57.

² *Leary v. Moran*, 106 Ind. 560.

³ *Tum Enden v. Jurgens*, 32 Misc. (N. Y.) 660.

⁴ *Cleveland Ry. Co. v. Wright*, 25 Ind. App. 525, 58 N. E. 559.

⁵ Citing Gould, Pleading, § 57; *Miller v. Knapp*, 133 Pa. St. 275, 19 Atl. 555, and other cases.

to show by proof, if it existed, that the animal was killed in pursuance of a reasonable police regulation in promotion of the public health.”¹

§ 535. **Same Subject.** — Similarly, the Idaho court has said: “On an examination of the complaint we find that it contains the usual allegations in an action of trover and conversion, and alleges that at the time of the conversion the appellants were the owners of and entitled to the possession of the property described. Each of those allegations, as well as other material allegations, was specially denied by the answer. These denials had the effect of the plea of the general issue or not guilty at common law. And it is stated in 21 Enc. Pl. & Pr. 1096: ‘At common law a plea of not guilty put in issue the plaintiff’s averments as to his ownership of the property and right of possession and entitled the defendant to introduce any and all evidence to overcome such allegations, and this is the rule which prevails in most of the states.’ And on page 1098, the author says: ‘Under a plea of not guilty or a general denial, the conversion of the goods is put in issue, and the defendant may introduce any and all evidence which goes to show that there was no conversion.’ We think it is well established that under a general denial in such a case the conversion of the goods is put in issue and the defendant may introduce any and all evidence which goes to show there was no conversion; and we think the defendant may show under such denial that the taking of the goods was with the plaintiff’s consent, and in pursuance of an agreement between the parties. The question of whether or not the defendants converted said property is directly put in issue by the pleadings. And if the defendant Smith proved that the plaintiffs had sold the wheat to him, that proof directly controverted the allegation of the complaint to the effect that the plaintiffs were still the owners of the property, or that the defendants converted the property to their own use, or that the defendants wrongfully deprived the plaintiffs of said property.”²

§ 536. **Value and Damages.** — The general rule is said to be that where the defendant pleads the general issue he puts the plaintiff on proof of the value of the property as a basis of his recovery, and that the defendant has the right to introduce any evidence that the property is of less value than alleged, or even that it is of no value.³

¹ *Barrett v. Mobile*, 129 Ala. 179, 30 So. 36, 87 A. S. R. 54, citing: *Tiedeman on State and Federal Control of Personal Property*, 828. See: *Gandy v. Cowart*, 163 Ala. 295, 50 So. 355; *Drew v. Spalding*, 45 N. H. 472; *Hanin v. Drew*, 83 Tex. 77, 18 S. W. 434; *Phoenix Ins. Co. v. Walrath*, 53 Wis. 669, 10 N. W. 151; *Jones v. Buzzard*, 2 Ark. 415.

² *Haynes, et ux. v. Kettenbach Co. et al.*, 11 Idaho 73, 81 Pac. 114; see *Bell v. G. Ober Co.*, 111 Ga. 668, 36 S. E. 904.

³ 21 Enc. Pl. & Pr. 1099.

Thus, it was held in an action for the conversion of a note that the defendant might show under a general denial that the maker of the note had neglected or refused to pay it, since the denial puts in issue the amount of the damages.¹ And under a similar denial the defendant was permitted to show the insolvency of the maker;² that the note had been altered and was therefore void;³ or that it was barred by limitation.⁴ The reason underlying these holdings is that in the action of trover the averment of the complaint as to the value of the property is not traversable matter. And as the defendant cannot take issue upon such allegation, his failure to specifically deny it is not an admission that the complaint states the true value; consequently, notwithstanding the failure of the defendant to deny the averment of value, plaintiff yet must prove it.⁵ However, where the defendant attempted to deny the allegations as to value, the court held that under the particular form of the denial no finding of the value was required, as plaintiff was not required to introduce any evidence in support of the allegation of value. Here the property was alleged to be of the value of \$600; the answer merely denied that the property was of the value of \$600; the court held that inasmuch as the denial was consistent with a value of \$599, it was "evasive and in fact no denial at all."⁶

§ 537. **Same Subject.** — In an action for the conversion of chattels which the plaintiff alleged were of a certain value, the defendant denied that they were of such value, or of any greater value than a certain less sum named. It was held that the denial was an admission that the chattels were of the value of the less sum named in the answer.⁷ But in an action for the value of a note and mortgage alleged to have been converted, the defendant filed a general denial; and it was held that thereunder he could show that in the state where the securities were executed they were barred by the statute of limitation and were therefore not of the value claimed by the plaintiff.⁸ And the rule upon which such rule is predicated was the same before the enactment of the code and was not changed by it. Thus, "In actions of trover, trespass or replevin before the code, it was not necessary for the defendant to deny the amount of the value of the

¹ Booth v. Powers, 56 N. Y. 22.

² Potter v. Merchants Bank, 22 N. Y. 641, 86 A. D. 273.

³ Booth v. Powers, *supra*.

⁴ Thompson v. Halbert, 109 N. Y. 329, 16 N. E. 675.

⁵ Paden v. Goldbaum, 37 Pac. 759 (Cal.).

⁶ Ronning v. Way, — Cal. —, 123 Pac. 615, citing, Westbay v. Gray, 116 Cal. 660, 48 Pac. 800; Marsters v. Lash, 61 Cal. 623.

⁷ Carlyon v. Lannan, 4 Nev. 156; Hage v. Campbell, 78 Wis. 572, 23 A. S. R. 422.

⁸ Thompson v. Halbert, 109 N. Y. 329, 16 N. E. 675.

allegation of damages, and in this respect the code has not altered the practice. They must be proved even though the defendant puts in no answer.”¹

§ 538. **Special Defenses; General Rules.** — A special plea in trover is an admission that plaintiff once had a cause of action against the defendant for the subject-matter involved, but that by reason of facts subsequently occurring, such right of action is barred or defendant has been relieved from liability. It is thus a form of confession and avoidance and not in any sense a formal denial of the allegations of the plaintiff's complaint. The defense may be based upon a release, accord and satisfaction, statute of limitation, discharge in bankruptcy, or a former recovery for the same cause of action, ratification, waiver, or other matter which may estop plaintiff. But it is said that if a special plea set up matters which may be shown under a plea of not guilty or a general denial, it will be held bad as amounting to the general issue.² Thus, a plea that the goods in question had been consigned to the defendant by plaintiff and sold pursuant to the order of the latter was held bad on a special demurrer, since such matters could be shown under a general denial.³ And the same was held where the special plea set forth title in the plaintiff and that the goods were taken as a distress for rent.⁴ Similarly, where a defendant answered and disclaimed any right, title or interest in the property, and alleged that he had *bona fide* sold the property as agent for the company for which plaintiff was assignee, it was held that the answer did not amount to a disclaimer but was merely a general denial.⁵

§ 539. **Special Plea must Confess and Avoid.** — It is the rule that a special plea in bar of an action of trover is not good unless it confess the conversion and present matters in avoidance of it.⁶ But while a mere denial of the conversion in the specifications of defense is only equivalent to the general issue, yet if facts are alleged which, if proved, would sustain such plea, the plaintiff will be required to prove the conversion, as it is not admitted by such plea.⁷ However, the defendant cannot himself offer evidence of matters of discharge or release under his general denial or under specifications of defense

¹ Jenkins v. Steanka, 19 Wis. 126, 88 A. D. 675; citing, Connoss v. Meir, 2 E. D. Smith, 314.

² Turner v. Waldo, 40 Vt. 51; Spalding v. Preston, 21 Vt. 9, 50 A. D. 68.

³ Kennedy v. Strong, 10 Johns. (N. Y.) 289; Leary v. Moran, 106 Ind. 560, 7 N. E. 236.

⁴ Briggs v. Brown, 3 Hill (N. Y.) 87.

⁵ Hamm v. Drew, 83 Tex. 77, 18 S. W. 434.

⁶ Coffin v. Anderson, 4 Blackf. 395; Hurst v. Cook, 19 Wend. 463. But see Gerard v. Jones, 78 Ind. 378.

⁷ Fenlason v. Rackliff, 50 Me. 362.

which amount merely to the general issue. He can offer no facts tending to show a confession and avoidance of the plaintiff's right of action unless a foundation has been laid by appropriate allegations on his part.¹ But where a special plea has been properly made, the defendant may show that plaintiff's act in obtaining the property was fraudulent or illegal;² that subsequent to the alleged conversion the property involved was sold under an execution in favor of the defendant and against the plaintiff;³ that plaintiff has ratified the act of conversion;⁴ that plaintiff is estopped to maintain the suit;⁵ or that there has been an accord and satisfaction.⁶

§ 540. **Plea of Justification.** — There is some difference of opinion among the courts as to whether matters strictly in justification of the act complained of may be shown by the defendant under a general denial. On principle, however, it would appear that the better reasoning is with those authorities holding that a justification may be shown under a general denial. In this connection, it must be understood that a justification means a legal excuse for the taking, sale or other act complained of. It does not mean a justification of a conversion. For a conversion, there can be no justification or legal excuse. The act is itself wrongful; and, being wrongful, any explanation of why it was done would be unavailing. The justification, therefore, must be an excuse acceptable in law for the doing of the act, and it must show that the act was not wrongful; and if it do this, it negatives the conversion, thereby rendering evidence of it admissible under a general denial.

§ 541. **Same Subject.** — In trover a valid authority for appropriation or destruction of the property involved may be proven under the general issue and in bar of the action.⁷ And it is held that, as all matters in defense may be given in evidence under the general issue except matters of release and statute of limitation, a special plea of justification on the part of an officer selling property under an execution is not necessary.⁸ So, where a cow had been impounded the defendant was permitted to show under his general

¹ *Blum v. Langfeld*, 37 N. Y. App. Div. 590, 56 N. Y. Supp. 298; *Geo. R. Dickinson Co. v. Mail Pub. Co.*, 31 S. W. 1083 (Tex.).

² *Miller v. Hirschberg*, 27 Ore. 522, 40 Pac. 506.

³ *Wehle v. Butler*, 35 N. Y. Super. Ct. 1, 12 Abb. Pr. N. S. 139, 43 How. Pr. 5.

⁴ *Stenhardt v. Bell*, 80 Ala. 208.

⁵ *Norwegian Plow Co. v. Haines*, 21 Neb. 689, 33 N. W. 475.

⁶ *McFadden v. Schroedder*, 4 Ind. App. 305, 29 N. E. 491, 30 N. E. 711.

⁷ *Gould on Pleading*, § 57.

⁸ *Pemberton v. Smith*, 40 Tenn. 18. But see, *Crenshaw v. Smith*, 57 Tenn. 1, where it was held that under the general issue it cannot be shown that the property was seized under attachment.

denial that the animal had been taken *damage feasant*.¹ Similarly, where the action was for the value of swine, it was held that the defendant could give in evidence the record before the justice of the peace showing that the swine had been taken and condemned for being at large contrary to a statute.² So, under a general denial it may be shown that the goods were taken by a constable under an execution against plaintiff.³ Where an officer and a plaintiff in an invalid *fiery facias* were sued jointly in trover for property sold under the writ, it was held that under a general denial made by them jointly the officer could show that he proceeded under the writ; but that if they had together pleaded a justification, the plea would have been held bad as to both of them.⁴

§ 542. **Doctrine Requiring Justification to be Pleaded.** — But a large number of courts do not agree with the foregoing doctrine, and it is maintained by them that matters in justification must be specially pleaded. And at least one case has attempted to take a middle ground in saying: "The correct rule is that in trover against a sheriff who has levied a *fi. fa.*, if the act of conversion be the seizure of goods, a justification under the writ must be specially pleaded; but if the conversion be the sale of the goods, the justification may be given in evidence under a plea denying the plaintiff's right of possession."⁵ Just why such distinction should be made does not appear. It is said that under a general denial in trover a defendant cannot prove a justification under an execution or leave and license from the plaintiff. He can only disprove the taking and conversion, not its unlawfulness.⁶ From this case it is apparent that the court forgot that the act constituting the conversion must necessarily be wrongful, as otherwise that can be no conversion; and if a defendant may, under a general denial, disprove the *conversion*, he thereby disproves the *wrongfulness* of the act claimed to have been a conversion. But the United States Supreme Court has lent the weight of its authority to this doctrine. It was held that evidence that plaintiff had had transactions with the defendant in which he became indebted and for which a judgment had been procured in defendant's favor was not admissible under a general denial.⁷ And

¹ Carey v. Dazy, 5 Hart. (Del.) 445; Drew v. Spalding, 45 N. H. 472.

² Knapp v. Miller, 133 Pa. 275, 19 Atl. 555.

³ McGrew v. Armstrong, 5 Kan. 284.

⁴ Weaver v. Cryer, 1 Dev. L. (N. C.) 337; Cleveland Co. v. Wright, 25 Ind. App. 525, 58 S. E. 559.

⁵ Eureka Iron Works v. Bresnahan, 66 Mich. 489.

⁶ Beaty v. Swartout, 32 Barb. 293; Greenthal v. Lincoln, 68 Conn. 384.

⁷ Nat'l Steamship Co. v. Tugman, 143 U. S. 28, 12 S. Ct. 361, 27 L. Ed. 87, affirming 30 Fed. 802.

the New York court has adopted the same doctrine. Thus, the answer contained a general denial and a special plea of justification under an execution against a third person. It was held that evidence of a levy of execution prior to that set up in the special defense was inadmissible under the general denial, but that if defendant was entitled to hold the goods under such prior levy it was a defense required to be specially pleaded.¹ And the Massachusetts court agrees with this. Statutory provisions required the answer to set forth in clear and precise terms each substantive fact intended to be relied upon in avoidance of the action. So it was held that an officer could not introduce in evidence records to justify his acts of which plaintiff complained, without specially pleading such matters of justification.² On like principle it is held that an answer was bad which alleged that defendant had taken the property at the request of the wife of the plaintiff — the latter having absconded — and that while the property was in the defendant's possession in another state it was taken in attachment by defendant and others against the plaintiff; the court held that the answer should have alleged the wife's authority and the attachment law of the foreign state.³ And where the answer alleged that the defendant as constable, took the property under an execution against a third person in whose possession it was found, but did not rebut the allegation that it was the plaintiff's property, the answer was stricken out by the court.⁴ So, where an officer, charged with wrongfully attaching the goods of the plaintiff, justifies his seizure and possession of the goods, he is precluded from later disclaiming such seizure and possession; and it was held that an instruction of the court was correct which told the jury that if the property was the plaintiff's the officer's seizure and assuming control over it was a sufficient conversion as a basis for the action.⁵

§ 543. **Plea of Waiver, Estoppel or Ratification.** — It is the general rule that a waiver, estoppel or ratification in an action of trover must be specially pleaded, if the defendant would avail himself thereof.⁶ Thus, as to the estoppel, it is said that before it can be claimed that a party shall not be permitted to falsify even his own declaration, act or omission, it must be shown that he thereby intentionally and deliberately led the other party to believe a particular thing true

¹ *Graham v. Harrower*, 18 How. Pr. 144; *Roberts v. Stuyvesant Safe Dep. Co.*, 123 N. Y. 57.

² *Savage v. Darling*, 151 Mass. 5, 23 N. E. 234.

³ *Baker v. Flint*, 63 Ind. 137.

⁴ *Barley v. Cannon*, 17 Mo. 595; *Richardson v. Hall*, 21 Md. 399.

⁵ *Brickley v. Walker*, 68 Wis. 563, 32 N. W. 773.

⁶ 1 *Bates, Pleading & Practice*, p. 522.

and to act upon such belief. And his answer to a pleading in a case must show that such was the fact.¹ And, furthermore, the answer must specially plead facts which are sufficient to amount to a valid estoppel. In accordance with this requirement, an answer was held insufficient where it failed to show that the plaintiff misrepresented to or concealed from the defendant any material fact, or that the defendant, in reliance upon the representation or acts of plaintiff, was induced to act in the manner complained of by plaintiff.²

§ 544. **Same Subject.** — Similarly, it has been said that in an action for the conversion of chattels, subsequent ratification by the plaintiff of the acts which constituted the alleged conversion cannot be shown under a general denial, but must be pleaded as new matter. "If the alleged ratification was included in the general denial made by the defendant, then the evidence in relation to it was properly submitted, and the instruction was appropriate. If it was new matter it should have been specially pleaded. . . . The plaintiff alleged conversion at a certain time. The fact, if it was one, that at a subsequent time it ratified the acts which constituted the alleged conversion might have deprived it of its right of action but would not be inconsistent with the allegation that there was a conversion. It cannot be said that the error was harmless to the plaintiff, since it was not apprised by the pleadings that it had to meet the defense of ratification. New matter must be specially pleaded so that the plaintiff may be informed of its existence and the use to be made of it by the defendant."³

§ 545. **Same Subject.** — Singularly, however, it has been held in some cases that a waiver or estoppel to claim a conversion by having brought suit on the implied contract to pay the value of the property, may be shown under a general denial, since it disproves a conversion and shows no title in the plaintiff;⁴ and it is an election to treat the property as sold to the defendants.⁵ It is hard to reconcile these holdings with the rule that matters which are in the nature of a confession and avoidance must be specially pleaded; and that a waiver or estoppel is a confession that a cause of action for a con-

¹ *Page & Co. v. Smith*, 13 Ore. 410, 10 Pac. 833; cited with approval in *Zarn v. Livesay et al.*, 44 Ore. 501, 75 Pac. 1056.

² *Baals v. Stewart*, 109 Ind. 371.

³ *So. Car Mfg. Co. v. Wagner*, 14 N. Mex. 195, 89 Pac. 259, citing *Bliss*, Code Pleading, 330; *Pomeroy's Code Rem.*, 567-8; *Coles v. Soulsby*, 21 Cal. 47; *N. Y. Ins. Co. v. Nat'l Pro. Ins. Co.*, 20 Barb. 468; *Sup. Tent K. of M. v. Stensland*, 105 Ill. App. 267.

⁴ *Terry v. Munger*, 121 N. Y. 161, 18 A. S. R. 803.

⁵ *Carroll v. Fethers*, 102 Wis. 436, 78 N. W. 604; *Rogers v. King*, 66 Barb. 495; *Thomas v. Watt*, 104 Mich. 201, 62 N. W. 345.

version once existed cannot well be doubted. By his contention of such waiver or estoppel, the defendant in effect says that he did convert the property, but the plaintiff, by some subsequent act, has barred himself from suing for such conversion.

§ 546. *Res Adjudicata*. — Upon the principle that defenses in bar of the right of plaintiff to maintain trover must be pleaded specially, a defendant, to avail himself of the fact that the issues involved have been determined in a previous adjudication, must set up such by a special plea, and cannot rely upon a general denial. And a plea of former recovery, in an action based on a wrongful sale of property, must show that the cause of action in the former suit was identical with the sale.¹ So, if a defendant rely upon a decree rendered in a chancery cause in another state, he must plead it.² In another case, the defendant filed a special plea alleging that he had bought the property from another without knowledge that the latter was not the owner; and that plaintiff, with full knowledge of the facts, waived the conversion by his vendor and brought assumpsit for the price against the defendant; that defendant was required to expend a large sum in the defense of the action in assumpsit, and that plaintiff should be held estopped from maintaining the action in trover. On demurrer to this special plea, it was held bad on the ground that it did not allege that the action in assumpsit had proceeded to judgment and that plaintiff had recovered therein.³ Again plaintiff had obtained a judgment in replevin for certain property and for damages for its detention. Defendant paid the damages but did not return the property. Plaintiff then sued him in trover for its value. Defendant set up in bar of the action the prior judgment in replevin. But the court held that the judgment in replevin, not having been satisfied, was not a bar to another action in trover.⁴

§ 547. *Set-off or Counter-claim*. — The codes provide that a defendant may avail himself of a cross-demand against the plaintiff by way of set-off or counter-claim when the cause of action constituting the set-off or counter-claim arises out of the transaction set forth in the complaint. And in an action of trover, the defendant may have the benefit of a set-off or counter-claim, provided he specially plead same in his answer.⁵ While somewhat aside from the question of pleading, I will give some notice to one case that well illustrates

¹ *Hopkinson v. Shelton*, 37 Ala. 306.

² *Picquet v. M'Kay*, 2 Blackf. (Ind.) 465.

³ *Gibbs v. Jones*, 46 Ill. 319.

⁴ *Vickerson v. Cal. Stage Co.*, 10 Cal. 520; *Miller v. Manice*, 6 Hill (N. Y.) 114.

⁵ *Hare v. Atlanta City Brewing Co.*, 65 Ga. 348; 19 Enc. Pl. & Pr. 738 *et seq.*

the rule as to when a counter-claim may be sustained to an action in trover. Prior to the action of trover, the appellant had brought an action in the court of a justice of the peace against the appellee, and caused a writ of attachment to be issued and certain bundles of merchandise to be levied upon. No service was had upon the defendant in that action. The constable who levied upon the goods placed them in the hands of the plaintiff for safe-keeping. The plaintiff then caused the suit to be dismissed and converted the goods to his own use. Defendant in that action then sued in trover for the value of the goods and obtained judgment in the justice court from which it was appealed to the county court in which it was stipulated that the defendant was guilty of conversion and that the value of the goods was \$153.38; that, if the defendant should be entitled to interpose his counter-claim as a set-off, the amount thereof should be \$99.38. The county court disallowed the counter-claim. The Supreme Court said: "The counter-claim was the basis of the suit which the appellant had brought against the appellee in which the attachment was issued, and the amount was due plaintiff in that suit on account of the purchase-price of a portion of the goods upon which the writ of attachment was levied. . . . Here the transaction was the unlawful conversion of the goods, and the counter-claim, to be a valid set-off, must grow out of that. An antecedent debt cannot be set off against the damages arising from the tort.¹ . . . It appears to be fundamental that a demand founded on contract cannot be set-off to damages proved in an action for the conversion of personal property."²

§ 548. **Same Subject.** — Where plaintiff had delivered oil to defendant for storage and the latter refused to surrender it trover was brought for its conversion. In its answer the defendant set forth the terms and conditions under which the oil had been stored and claimed that thereunder it was entitled to an allowance for evaporation and for charges for storage. The trial court sustained a demurrer to this answer, and in holding this to be error, the appellate court said: "When the answer alleges the agreements of the parties in reference to the subject-matter of the action, the wrongful or unlawful conversion of the oil becomes of no consequence, and the action becomes one in which the rights of the parties are to be determined by their agreements concerning the subject-matter

¹ Citing: *Schaeffer v. Empire L. Co.*, 51 N. Y. App. 104; *Reaner v. Morrison Ex. Co.*, 93 Mo. App. 501, 67 S. W. 718; 6 *Current Law*, 1444; *Hanson v. Byrnes*, 96 Minn. 50, 104 N. W. 762.

² *Goldberger v. Liebowitz*, — Col. —, 93 Pac. 1108; citing *Waterman on Set-Off*, § 138.

in controversy between them.”¹ The answer of the defendant must set forth the cause of action upon which he expects to recover. As to such, he assumes the affirmative. And his answer is to be tested by the same rules of pleading as determine the sufficiency of the complaint which sets up the original cause of action. Therefore, the answer must set forth the facts constituting the rights of the defendant, the injury committed by the plaintiff, and must specify what relief is sought.²

§ 549. **Same Subject.** — One case which has come under my observation seems to have held contrary to the foregoing. The plaintiff had delivered to the defendant a note which the latter was to collect. He made collection but did not pay over the proceeds. In an action of trover for the conversion of the note, it was held that the defendant could assert a claim for services in the collection of the note, since this arose out of the original transaction, and it was further held that such claim could be asserted under the general issue.³

§ 550. **Matters in Mitigation of Damages.** — All matters relied upon as being in mitigation of damages must be specially pleaded. In an action of trover for the irregular sale of mortgaged chattels, the court said: “There is a line of authorities holding that if a chattel mortgage is irregularly foreclosed in good faith and the property sold to another than the mortgagee, the mortgagor may treat the transaction as a conversion of the property by the mortgagee and sue accordingly, and in such case the measure of damages is the difference between the value of the property at the time of the conversion and the amount of the mortgage debt.”⁴ But the defendants cannot invoke this rule because they have not pleaded the amount due on the mortgage in mitigation of damages. At common law a defendant was entitled to give in evidence under the general issue any matter constituting a valid defense, and following this rule, some of the cases cited hold that in an action of trover a defendant may give facts in mitigation of damages without pleading them; but our statute has changed the common law rule and substituted for the general issue an answer which must contain a general or specific denial of the material allegations of the complaint intended to be controverted and a statement of any new matter constituting a de-

¹ *Cow Run Tank Co. v. Lehmer*, 41 Ohio St. 384; *Glidden v. Mech. Nat'l Bank*, 53 Ohio St. 588.

² *Beckham v. Burney*, 42 S. W. 1041 (Tex. Civ. App.). See *Kellogg v. Holly*, 29 Ill. 437, and *Casey v. Ballou Banking Co.*, 98 Ia. 107, where it was said that if the defendant claim a lien on the property, he must set forth such claim in his answer.

³ *Turner v. Retter*, 58 Ill. 264, citing *Babcock v. Trice*, 18 Ill. 420.

⁴ Citing a list of authorities.

fense or counter-claim. Under this statute, the defendant can only put in evidence under the denials such facts as go to disprove the plaintiff's cause of action. If he intends to rest his defense upon any other matter, such as payment, estoppel, former adjudications, illegality of consideration, contributory negligence, negligence of a fellow-servant, and the like, it must be pleaded.¹ And so with the defense of mitigation of damages. Such a defense is in effect a plea in confession and avoidance. It amounts to an admission of the cause of action alleged in the complaint, but asserts that plaintiff cannot recover the entire damages sustained by him on account thereof because of extraneous matter which does not contradict any fact necessary to be established by the plaintiff to authorize a recovery. Now when we examine the answer in this case, we find that it attempts to set up a chattel mortgage and the foreclosure thereof as a complete defense or bar to the action. It may be doubted, therefore, whether it could under any circumstances be treated as a partial defense by way of mitigation of damages. But, waiving this point, the answer does not contain facts sufficient to constitute a defense. It is not alleged that the defendants were the owners of the mortgage debt at the time of the alleged conversion, nor that any part of the debt secured by such mortgage was unpaid, nor that the sheep described in the mortgage were the same sheep mentioned in the complaint. These are all matters of essential importance in a plea in mitigation of damages. Without them, the plaintiff would not be informed of the facts intended to be relied upon as a defense and could not be prepared to meet them on the trial."²

§ 551. *Same Subject.* — This rule requiring matters in mitigation of damages to be specially pleaded, though founded in reason and apparently in consonance with the code requirements, has not received universal approbation. Thus, it has been held that, after a default, any matter which shows that the action of plaintiff is barred, and which might have been shown under the general issue, may be availed of by the defendant to mitigate the damages.³ And in reference to the giving in evidence of facts under the general issue for the purpose of mitigation, which, if specially pleaded, would have amounted to a full defense, the New York court has said: "As the code contains no express rule on the subject of mitigation, except in a single class of actions, this question cannot be properly determined without a recurrence to the principles of the common

¹ Citing a list of authorities.

² *Springer v. Jenkins et al.*, 47 Ore. 502, 84 Pac. 479.

³ *Collins v. Smith*, 16 Vt. 9.

law. By those principles, defendants in actions sounding in damages were permitted to give in evidence in mitigation, not only matters having a tendency to reduce the amount of the plaintiff's claim, but in many cases facts showing that the plaintiff has in truth no claim whatever. It was not necessarily an objection to matter offered in mitigation that if properly pleaded it would have constituted a complete defense."¹

§ 552. **Matters in Justification.** — Greenleaf has said that it is a sound rule in pleading that matter which goes in complete justification of the charge must be specially pleaded in order that the plaintiff may be prepared to meet it; and cannot be given in evidence under the general issue, as this would be a surprise upon him. If, therefore, the defendant pleads the general issue, this is notice to the plaintiff that he has nothing to offer in evidence which amounts to a justification of the charge; and hence no matter which goes in justification will be received, even in mitigation of damages.²

§ 553. **Statute of Limitations.** — It is a rule of general application not only in trover but in other actions as well that the defense of the statute of limitations is a personal privilege of the defendant which he may invoke or waive at his option.³ And unless the fact that the action is in truth barred clearly appears from the complaint, the statute must be specially pleaded by the defendant, as evidence thereof is not admissible under a general denial.⁴

§ 554. **Admissions.** — The answer or plea of the defendant in an action of trover may, either by its silence as to any material allegation of the complaint, or even by the very force of the terms used in the answer in reference to such allegations, be an admission of the truth of the allegation and thereby furnish the proof itself which plaintiff would otherwise be required to produce. Thus, where the answer merely denied that on the day named in the complaint the plaintiff was the owner and lawfully in possession of the property, it was held that no relevant or material issue was formed by the attempted denial.⁵ Similarly, where the denial was that the defendant "wrongfully or unlawfully" converted the property involved. This was held to be an admission of the conversion.⁶ So,

¹ *McKyring v. Bull*, 16 N. Y. 297.

² *Greenleaf, Evidence*, § 274.

³ *Kramer v. Halsey*, 82 Cal. 89, 22 Pac. 1137; *Grattan v. Wiggins*, 23 Cal. 16; *Davis v. Davis*, 20 Ore. 78, 25 Pac. 140; *Cross v. Moffatt*, 11 Col. 210, 17 Pac. 771.

⁴ *Lyon v. Bertram*, 20 How. (U. S.) 149; *Atchison, etc. Co. v. Tanner*, 19 Col. 659, 36 Pac. 541; *Smith v. Hutchinson*, 78 Va. 683; *Hoye v. Penn. Co.*, 191 N. Y. 101, 17 L. R. A. (n. s.) 641; *Wood, Limitations* (3d ed.), 100, § 41.

⁵ *Kuhland v. Sedgwick*, 17 Cal. 123.

⁶ *Podlech v. Phelan*, 13 Utah 333, 44 Pac. 838.

where the answer alleged that the building involved had been attached as personal property, this was an admission that it was such, or, rather, the defendant became thereby estopped from asserting that it was a part of the realty upon which it was situated.¹ An admission of a material fact in the defendant's answer to a complaint in trover is not reconcilable with a general denial; and where the answer contains both, the general denial must give way to the admission. Thus, the defendant was held bound by the admission of plaintiff's ownership in one paragraph of his answer, even where another paragraph contained a general denial.² And a partial denial may be such as to amount to an admission of one of the material elements of a conversion. This was illustrated in a case where the answer did not deny taking the chattels involved, but did deny taking them from the plaintiff. By such answer the plaintiff was held relieved from proving the taking.³ But where the conversion charged was for a refusal to deliver the property, it was held that an admission of a demand and non-compliance was not an admission of a refusal to deliver.⁴

§ 555. **Amendments.** — The rule of liberality of the courts in most jurisdictions in the allowance of amendments in general applies where it is sought to amend an answer in an action of trover. The application rests in the discretion of the court to allow such amendments as may be necessary for the purpose of determining the real controversy between the parties.⁵ It is therefore for the trial court to determine as a matter of justice whether an amendment should be allowed; and in the exercise of its discretion, unless in case of gross abuse, there will be no interference from an appellate court. Thus, where a corporation wrongfully appropriated a building to its own use, and sold it to the defendant which took possession, and refused to surrender possession or pay the value of the building to the owner, it was held no error where the trial court refused to permit an amendment to deny an allegation of the complaint that defendant had assumed the obligations of the seller; it being said that it was immaterial whether such obligations were so assumed or not.⁶

¹ *Wheeler v. McFerron*, 33 Ore. 22, 52 Pac. 993; *Ramsey v. Hurley*, 72 Tex. 198.

² *Humpfner v. Osborne*, 2 S. D. 310; *Proctor v. Irvin*, 22 Mont. 547, 57 Pac. 183.

³ *Lampson v. Brander*, 28 Minn. 526; *Blum v. Langfeld*, 37 N. Y. App. Div. 590; *Perkins v. Marrs*, 15 Col. 262; *Fleckenstein v. Inman*, 27 Ore. 328.

⁴ *Halbran v. Gray*, 25 N. Y. Misc. 693, 55 N. Y. Supp. 501; see, in general, *Carlyon v. Lannan*, 4 Nev. 156; *Connoss v. Mier*, 2 E. D. Smith, 314; *Hoge v. Campbell*, 78 Wis. 572, 23 A. S. R. 422.

⁵ See *Robinson v. Hartridge*, 13 Fla. 501; *Fry v. Soper*, 39 Mich. 727; *Lake Shore Co. v. Hutchins*, 37 Ohio St. 282; *Clandenning v. Hawk*, 8 N. D. 419; *George v. Pierce*, 123 Cal. 172, 55 Pac. 775, and 56 Pac. 53; *Thayer v. Manley*, 73 N. Y. 305.

⁶ *Tebbetts v. No. Com. Co.*, 36 Wash. 599, 79 Pac. 203.

§ 556. **Reply.** — If, in an action of trover, the answer of the defendant set up matter other than a denial of the allegations of the complaint, it is necessary for the plaintiff by reply either to deny such new matter, or confess its truth and disclose matters in avoidance of it. Of course, the answer must be closely scrutinized to ascertain whether in fact it sets up any new matter. Thus, where goods had been stored by the plaintiff with the defendant but trover was brought for a part of them not returned by the defendant, the answer set up that such part had been sold under an attachment brought by the defendant against the plaintiff for storage charges. It was held that no reply was necessary, as the answer merely denied that there had been a conversion.¹ And the same is true where the answer avers that a third person is the owner of the goods;² or that the defendant himself has title.³ And where the action was by a mortgagee against another than the mortgagor, the defendant averred that he held the property by virtue of a lien for keeping it, created prior to the mortgage, and the answer demanded a sale of the property to satisfy the lien; it was held that such answer did not set forth a counter-claim, nor were the allegations admitted by the absence of a reply.⁴

§ 557. **Reply must Meet Whole Answer.** — The reply must be responsive to the whole answer to which it is directed. If any material part of the answer is not met by the reply the latter will be held defective. As illustrative of a reply insufficient in this respect, an administrator brought trover for the conversion of chattels belonging to the estate he represented. The defendant answered that the deceased had in his life-time assigned, transferred and delivered the chattels to defendant, and had later executed a certain release to defendant. The plaintiff replied that such release was executed without consideration. Such reply was held bad in that it failed to meet the issue as to the transfer and delivery of the property to the defendant.⁵ But in another case the answer averred that the only interest plaintiff ever had in the goods was as an administrator; that defendant lawfully bought the goods from plaintiff's successor. The reply alleged that while plaintiff was still administrator the goods were in the possession of third parties who claimed them; that as administrator he brought replevin, in which suit said third parties were declared to be the owners; that by reason of the de-

¹ *Dunning v. Choate*, 8 Ohio Dec. 316.

² *Krewson v. Purdon*, 13 Ore. 563.

³ *Rogers v. King*, 66 Barb. 495; *Fisher v. Meek*, 38 Ill. 92.

⁴ *Bissell v. Pearse*, 21 How. Pr. 130.

⁵ *Gerard v. Jones*, 78 Ind. 378.

fendant's conversion of the goods plaintiff was unable to return the goods to the owners, and the latter sued him on his replevin bond and procured judgment, which judgment he paid from his own funds, and thereby became the owner of the goods; all of which was known to the defendant. It was held that the reply was sufficient.¹

§ 558. **Reply must be Consistent with Complaint.** — But the reply must not be inconsistent with the allegations of the complaint. Rather, it must be explanatory thereof. Where an attorney was charged with the conversion of a note obtained from his client, the answer alleged that the note was taken as an attorney's fee. The reply admitted this allegation of the answer, but averred that the defendant received other pay and agreed to return the note. It was held that this reply was not a departure from the complaint.² So, where the answer alleged that the act of conversion was committed by another without the knowledge of the defendant, a reply averring that the person who committed the act was the agent of the defendant and that the act was subsequently ratified by defendant was not a departure from the cause of action alleged in the complaint.³ And where the answer pleaded in bar a former judgment in which action a set-off was claimed, a reply alleging that the set-off had been disallowed was held sufficient.⁴ And where the answer alleged a settlement, a reply was held no departure which averred fraud and misrepresentation by the defendant for the purpose of avoiding the effect of the settlement.⁵ Neither is it a departure to allege possession as pledgee,⁶ or trustee.⁷

¹ *McFadden v. Schroeder*, 4 Ind. App. 305, 29 N. E. 491.

² *Dodds v. Gregson*, 35 Wash. 402, 77 Pac. 791.

³ *McLaughlin v. Barker*, 64 Mo. App. 511.

⁴ *Haas v. Taylor*, 80 Ala. 459, 2 So. 633.

⁵ *Col. Fuel & Iron Co. v. Chappell*, 12 Col. App. 385, 55 Pac. 606.

⁶ *Mer. Nat'l Bank v. Richards*, 6 Mo. App. 454, 74 Mo. 77.

⁷ *Conklin v. Botsford*, 36 Conn. 105. See, in general, *Zorn v. Lafferty*, 44 Ore. 501, 75 Pac. 1057; *Foster Lumber Co. v. Kelly*, 9 Kan. App. 377, 58 Pac. 124; *Mulliner v. Shumake*, 55 S. W. 983 (Tex. Civ. App.).

CHAPTER X

WAIVER OF CONVERSION

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| <p>§ 559. General considerations in waiving torts.</p> <p>§ 560. Same subject.</p> <p>§ 561. Same subject.</p> <p>§ 562. What is meant by waiving a tort.</p> <p>§ 563. When tort may be waived.</p> <p>§ 564. Same subject.</p> <p>§ 565. When tort not waived.</p> <p>§ 566. When promise necessary in waiving tort.</p> <p>§ 567. Agreement to pay implied.</p> <p>§ 568. Who may waive a tort.</p> <p>§ 569. General principles in waiving conversion.</p> <p>§ 570. Where owner accepts return of property.</p> <p>§ 571. Acquiescence in wrongful act.</p> <p>§ 572. Demand for return of property.</p> <p>§ 573. Release from liability.</p> <p>§ 574. Suing in assumpsit; view that property must have been sold.</p> <p>§ 575. Same subject; where money converted.</p> | <p>§ 576. Same subject; affirming sale.</p> <p>§ 577. Same subject.</p> <p>§ 578. Same subject; goods purchased through fraud.</p> <p>§ 579. Where goods used but not sold.</p> <p>§ 580. View that property need not have been sold by wrongdoer.</p> <p>§ 581. Same subject.</p> <p>§ 582. Same subject; waiver is on theory of implied contract.</p> <p>§ 583. Same subject.</p> <p>§ 584. Same subject; where property severed from realty.</p> <p>§ 585. Same subject.</p> <p>§ 586. Same subject.</p> <p>§ 587. Same subject.</p> <p>§ 588. Same subject.</p> <p>§ 589. Effects of waiver.</p> <p>§ 590. Same subject.</p> <p>§ 591. Whether election of one remedy waiver of others.</p> <p>§ 592. Same subject.</p> <p>§ 593. Same subject.</p> |
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§ 559. **General Considerations in Waiving Torts.** — In another work ¹ I had occasion to make the following observations regarding the general principles underlying the waiver of a tort for the purpose of suing on an implied contract: "If a party have the right under the law to sue either in tort or on an implied contract under the same line of facts, he will be held to have waived one by proceeding on the other. But no waiver can take place unless the party have full knowledge of all the facts and of all his rights thereunder."²

¹ The Law of Waiver, §§ 343-4.

² *Silvey v. Tift*, 123 Ga. 804, 51 S. E. 748, 1 L. R. A. (N. S.) 386.

A party may waive an action of tort and sue in assumpsit for the money which he paid on the contract or which the defendant has received under it; but where part of the consideration was land and claims against other persons, a recovery for them cannot be had under a count for money had and received unless so far as the defendant may have converted them into money. If more than mere rescission is sought, the plaintiff must sue for damages.¹ A party cannot waive a tort and bring an action in assumpsit against the tort-feasor except where the property has been converted into money or its equivalent."²

§ 560. **Same Subject.** — "If one has taken possession of property and sold or disposed of it without lawful authority, the owner may either disaffirm his act and treat him as a wrong-doer and sue him for a trespass or for a conversion of the property, or he may affirm his acts and treat him as his agent and claim the benefit of the transaction; and if he has once affirmed his acts and treated him as his agent, he cannot afterward treat him as a wrong-doer nor can he affirm his acts in part and void them as to the rest.³ So, if property has been disposed of by him who tortiously obtains possession of it, the tort may be waived and assumpsit maintained,⁴ even though there is no positive proof as to the amount received for the property.⁵ And if a passenger is injured through the negligence of the carrier, while travelling under a contract, he may waive the contract and sue in tort, or *vice versa*."⁶

§ 561. **Same Subject.** — Upon these general principles, Street makes the following comment:⁷ "A second group of quasi-contractual duties is found in those cases where a plaintiff is allowed to waive the tort and sue on the contract. The doctrine here is that wherever a tortious act results in the enrichment of the tort-feasor at the expense of another, whether by the acquisition of property, or of labor and service, the person from whom the property is taken or withheld, or the person who bestows the labor and service, may sue upon the duty to compensate which the law imposes upon the wrong-doer. In these cases it was originally necessary that there should be some specific thing passing from the person injured to the tort-feasor before the law would impose a duty to compensate. In

¹ Pearsoll v. Chapin, 44 Pa. St. 9.

² Emerson v. McNamara, 41 Me. 565; Androscoggin Co. v. Metcalf, 65 Me. 40; Quimby v. Lowell, 89 Me. 547, 36 Atl. 902.

³ Addison on Torts, 33.

⁴ Miller v. King, 67 Ala. 575; Doon v. Raney, 49 Vt. 293.

⁵ Smith et al. v. Jernigan, 83 Ala. 256, 3 So. 515.

⁶ L. S. etc. Ry. Co. v. Teeters, 166 Ind. 335, 77 N. E. 599, 5 L. R. A. (N. S.) 425.

⁷ II Foundations of Legal Liability, 215.

other words, legal theory clung to the original conception of *quid pro quo*. But just as in the early common law labor and service came to be conceived as a sufficient *quid pro quo*, upon which to predicate a debt, so here it is now held that labor and service are sufficient to raise a quasi-contractual duty in the nature of debt."

§ 562. **What is Meant by Waiving a Tort.** — It has been thought that the expression "waiving the tort and suing on the contract" is misleading.¹ It would seem to be clear that the plaintiff does not "waive" the tort, but rather that he simply has an election of remedies, *ex contractu* or *ex delicto*, of which he may pursue either, but not both. In the situation where the tort may be waived and suit brought upon the *quasi* contract, the plaintiff is said to have an election of remedies.² And where either the delictual or contractual remedy has been chosen, the plaintiff cannot, it has been held, ordinarily lay it aside to try the other.³ In a sense it is undoubtedly true that there is merely an election of remedy, for exactly the same state of facts must be shown to maintain either. But it should not escape observation that the respective remedies proceed upon different theories. In pursuing the contractual remedy (*indebitatus assumpsit*) the plaintiff sues upon a legal duty, in the nature of debt, to compensate for benefit received by the defendant. In trespass and trover he sues upon the legal duty to compensate for damages done. A plaintiff who, according to the accepted formula "waives the tort" and sues upon the contractual duty may therefore more properly be said in the language of Judge Nicholson merely to waive damages for the conversion and to sue for the value of the property.⁴

§ 563. **When Tort may be Waived.** — The underlying question in all cases involving the right to waive a tort obviously is, when and under what circumstances will the law imply a promise on the part of the defendant to pay?⁵ And such an implication will not arise unless some benefit has accrued, or is intended to accrue in favor of the wrong-doer,⁶ it also being said that the right to waive the tort and recover as on an implied assumpsit is an exception to the principles of code pleading, and there must be no extension

¹ II Street's Foundations of Legal Liability, 218.

² Cooper v. Cooper, 147 Mass. 370.

³ Thompson v. Howard, 31 Mich. 309; Conrow v. Little, 115 N. Y. 387; Equitable Co-op. Co. v. Hersee, 103 N. Y. 25.

⁴ Kirkman v. Philips, 7 Heisk. (Tenn.) 222; *In Re Hirschman*, 104 Fed. 69.

⁵ Norden v. Jones, 33 Wis. 600, 14 A. R. 782.

⁶ Horne v. Mandelbaum, 13 Ill. App. 607; Greer v. Newland, 70 Kan. 310, 77 Pac. 98, 109 A. S. R. 424, 70 L. R. A. 554; Osborn v. Bell, 5 Den. 370, 49 A. D. 275; Fanston v. Linsey, 20 Kan. 235; 15 Am. & Eng. Enc. L. 1115.

beyond what is allowed at common law.¹ "There seems to be no difference of opinion upon the proposition that a mere naked trespass, although creating a liability for damages, cannot be the basis of an implied assumpsit. Its basis is the benefit which the wrong-doer has received. Therefore, the action of assumpsit is not to recover damages for the tort, but to recover the value of that which the wrong-doer has appropriated to his own use, the law implying a promise to pay its reasonable value. And formerly it was universally held — and is still held in many jurisdictions — that the right to waive a tort and to sue on an implied assumpsit must be limited to cases where goods and chattels have been wrongfully taken and sold by the wrong-doer. The owner might then disaffirm the act, and, treating him as a wrong-doer, sue in trespass, or he might affirm the act, and, treating the wrong-doer as an agent, claim the benefit of the transaction. When we go beyond this proposition, there is a square conflict of opinion. But certain it is that the rule has been extended to cases where there has been a wrongful conversion of property of one person to the use of another, whether sold or not by the latter, and also to cases where a trespasser has severed trees from land in possession of the owner, or has quarried stone thereon, and has afterward taken the trees or stone away, converting the same to his own use, so that trover or replevin might be maintained. That the doctrine has been greatly developed and extended in application is apparent, and that in cases where property has been severed from real estate by a wrong-doer, carried from the freehold, and converted to his own use, the rightful owner may sue and recover its value as on an implied contract, is thoroughly established although it may not be in harmony with the principles of reformed system of pleading."²

§ 564. **Same Subject.** — The tendency of modern courts to more liberally permit the transmutation of rights of action properly in tort to the remedy by assumpsit has been regretted by some courts. Of this, one court has said: "The arbitrary use which has been made of the action (assumpsit) has caused many incongruities and no little confusion. The practice of strained constructions and the invention of fictions and intendments to subject causes of action to the remedy which were foreign to it, has led somewhat to a confounding of transactions which are not contracts, with those which are, and to a neglect of obvious and necessary distinctions. But it may be observed in passing that it is not the only occasion where

¹ *Downs v. Finnegan*, 58 Minn. 113, 59 N. W. 981, 49 A. S. R. 488.

² *Downs v. Finnegan*, *supra*.

inaccuracies have been generated by a too close adherence to the plan of studying causes of action through forms of action. The circumstance that a cause of action in point of fact not *ex contractu* is allowed to be sued in *assumpsit* and to be described as matter of contract and to be loosely spoken of as implied contract is of no more force to fix its actual character contrary to the truth than is the allegation of loss and finding in trover to convey the sense of a literal loss and finding. Permission to apply the action to a transaction not involving any real contract relation between the parties cannot change the true nature of the transaction and transform it into matter of contract. Courts cannot make contracts for parties. And the fictions and intendments permitted for the sake of the remedy are explainable whenever necessary.”¹

§ 565. **When Tort Not Waived.** — It has been held that where property of the plaintiff was taken by the defendant without any intention of permanently converting it to his own use, and such property was injured by the temporary wrongful use, yet the wrongdoer holds it for the owner and makes no claim to it, he was liable for the tort, but could not be charged with the value of the property upon an account as for goods sold and delivered.² But where property had been seized and sold to pay an illegal assessment, it was held that, while the owner could sue the assessor in tort, yet he also had the right to waive the tort and sue the municipality in *assumpsit* for the proceeds of the sale.³ In another case the action was against the assessors for an assessment which was unauthorized and illegal.⁴ And there it was said: “Although the money collected by this illegal distress and paid into the parish treasury might have been recovered by an action for money had and received against the parish, yet in that form of action the remedy might not have been commensurate with the injury, and the defendant was not bound to resort to that mode of redress.”⁵

§ 566. **When Promise Necessary in Waiving Tort.** — But it is indicated that in order to permit a claimant of damages to lay aside his right to proceed *ex delicto* and to invoke a remedy *ex contractu*, there must be something to indicate the idea of a promise in fact, or there must be such circumstances that a presumption will be indulged that the defendant assumed ownership of the chattels as vendee. In explanation of this requirement, an instance has been

¹ Woods v. Ayres, 39 Mich. 345, 33 A. R. 396.

² Reynolds v. Padgett, 94 Ga. 347, 21 S. E. 570.

³ Ware v. Percival, 61 Me. 391, 14 A. R. 565.

⁴ Inglee v. Bosworth, 5 Pick. 502.

⁵ Amesbury, etc. Co. v. Amesbury, 17 Mass. 461; Sumner v. First Parish, 4 Pick. 361.

suggested of a coal merchant who, by the mistake of his driver, empties a ton of coal at my door, and I take it without inquiry or objection, and consume it knowing that it must have been left by mistake. In such case, a recovery could be had against me in assumpsit under a count for goods sold and delivered, upon an implied promise to pay the market price. But under the circumstances, I was guilty of converting the property to my own use,¹ and thus received a benefit from the transaction.

§ 567. **Agreement to Pay Implied.** — The basis of the right of waiver in such cases is that the defendant has impliedly agreed to pay the market value of the chattels. But a promise of this character is not implied against or without the consent of the person attempted to be charged by it, and where one is implied, it is because the party intended it should be, or because natural justice requires it, in consideration of some benefit received.² “If an action for goods sold will lie in any case for a mere tortious taking, the goods not having been turned into money by the wrong-doer, it must be because the law will, in such case, imply a promise to pay for them; for assumpsit can only be maintained upon a promise, express or implied. Where the goods have been applied to the use of the wrong-doer, it may not be unreasonable, and certainly not unjust, to imply a promise to pay for them, without regard to the manner in which the goods were originally acquired. The wrong-doer is responsible in some form of action for their value, and he cannot be prejudiced by holding him as a purchaser and not as a trespasser.”³ “The same act or transaction may constitute a cause of action both in contract and in tort, and a party may have an election to pursue either remedy. In that case he may be said to waive the tort and sue in contract. But a right of action in contract cannot be created by waiving a tort, and the duty to pay damages for a tort does not imply a promise to pay them upon which assumpsit may be maintained.”⁴ “If there are in the case all the elements of an implied contract, it is of no consequence that there is, over and beyond these, some other circumstance not in any way militating against the plaintiff’s claim, but rather the reverse, which constitutes a tortious element and might support an action as for tort. Here, as the defendant cannot possibly be prejudiced by that course, the plaintiff

¹ *Saterlee v. Melick*, 76 Pa. St. 62.

² *Webster v. Drinkwater*, 5 Me. 319, 17 A. D. 238.

³ *Osborn v. Bell*, 5 Denio 370, 49 A. D. 275.

⁴ *Cooper v. Cooper*, 147 Mass. 370, 17 N. E. 892, 9 A. S. R. 721; see *Nat’l Trust Co. v. Gleason*, 77 N. Y. 400, 33 A. R. 632; *Hassam v. Hassam*, 22 Vt. 516; *Fanson v. Linsley*, 20 Kan. 235; *Sandeen v. Kan. City Ry. Co.*, 79 Mo. 278.

may ignore the tortious element and rely solely upon the facts which support the implication of a promise. He may waive that which rendered the act, in the legal sense, wrongful, and rely upon the remainder.”¹ However, it is the rule that a plaintiff will not be permitted to waive a tort and sue on an implied contract if such waiver would result in giving to the court jurisdiction which it would not have in an action *ex delicto*.²

§ 568. **Who may Waive a Tort.** — The owner of chattels adversely affected by a tort is the proper person to make an election as between the actions *ex delicto* and *ex contractu*.³ Or, if he be dead, or incapacitated from suing, then the waiver may be made by his legal representatives, or those who become subrogated to his rights.⁴ Of this latter class of persons is a trustee in bankruptcy, and, after reviewing the authorities, the Idaho court has said relative thereto: “We have no doubt of the right of the trustee in bankruptcy to waive the tort where the property has been wrongfully converted, and sue in assumpsit.”⁵ This court quoted from an Alabama case in which a creditor who was pursuing the property of his debtor which had been wrongfully converted by another, sought to waive the tort and maintain an action of assumpsit, as follows: “But because the owners of the property wrongfully sold might maintain an action of assumpsit to recover the proceeds of the sale, it does not follow that the money can be attached by the creditors. The creditors have no right to waive the tort or to surrender the right to recover back the property, or to release the damages against the tort-feasor. Those are rights which appertain to the owner of the property alone, and his creditors cannot defeat them by bringing a garnishment proceeding against him who may have the funds arising from the sale of the property.”⁶ Until the owner of the property has made his election to sue for the money, which may be done by bringing an action for it, the person having the money cannot, in any just sense, be deemed his debtor. To allow the money to be taken in attachment might be productive of confusion and wrong. It could not prevent the owners of the property from suing for its recovery,

¹ Cooley, Torts, 108; Shaw v. Coffin, 58 Mo. 254, 4 A. R. 290; Staat v. Evans, 35 Ill. 455; Tightmeyer v. Mongold, 20 Kan. 90.

² Ahern v. Carroll, 30 Mo. 200; Finlay v. Bryson, 84 Mo. 664; Elliott v. Jackson, 3 Wis. 649.

³ Lewis v. Dubose, 29 Ala. 219.

⁴ *Id.*; Markel v. Rochester, 135 Fed. 904; Chicago Bank v. Cox, 143 Fed. 91, 74 C. C. A. 285; Blackshear v. Burke, 74 Ala. 239; Plefka v. Detroit Co., 147 Mich. 641, 111 N. W. 194.

⁵ Dittmore v. Cable Milling Co., 16 Idaho 298, 101 Pac. 593, 133 A. S. R. 98.

⁶ Citing Lundie v. Bradford, 26 Ala. 512.

or for the damages, and would yet concede to them the benefit of the appropriation of the money to the payment of their debts, and leave the clerk who received the money without the means of re-imbursing the person against whom an action might be brought.”¹ Some difference has developed among the courts as to whether one tenant in common of chattels which have been converted has the right or power to waive the tort and sue in assumpsit; but no good reason presents itself why the rule should not be that all the tenants may waive the tort, or that each may bring a separate action for his interest without joining the others therein.²

§ 569. **General Principles in Waiving Conversion.** — While as will be hereinafter seen, the question of a waiver of a conversion has been most frequently presented to the courts in cases involving the right to bring assumpsit upon the facts constituting the conversion, yet there have been many instances in which courts have been called upon to determine whether the party seeking to sustain the action of trover has not in fact by his conduct waived the conversion and thereby precluded himself from sustaining any action whatever. In this connection, it may be well as a premise to further discussion of the subject, to recall that waiver is a voluntary relinquishment of some right, a foregoing or giving up of some benefit or advantage, which, but for such waiver, a party would have enjoyed. It may be proved by express declarations; or by acts and conduct manifesting an intent and purpose not to claim the supposed advantage; or by a course of acts and conduct, or by so neglecting and failing to act, as to induce the belief that it was the intention and purpose to waive the right.³ And the right of a party to sue in trover for a conversion of his chattels by another is such a right as he may insist upon or not as he may elect, and his election may be shown by his acts, or by his failing to act, when his duty required action, as well as by his express renunciation of his right so to proceed.

§ 570. **Where Owner Accepts Return of Property.** — If the owner takes back his chattels with knowledge of such facts as in law constitute a conversion of them, and assumes ownership as if no tort had been committed in respect of the property, such is evidence of the waiver of the conversion, and the owner will be precluded from maintaining trover.⁴ The assumption of ownership is not of itself sufficient to amount to a waiver of the conversion if the owner was

¹ *Lewis v. Dubose & Co.*, 29 Ala. 219.

² See: *Smith v. Tankersley*, 20 Ala. 212, 56 A. D. 193; *White v. Brooks*, 43 N. H. 402; *Irwin v. Brown*, 35 Pa. St. 331; *Tankersley v. Childers*, 23 Ala. 681.

³ *Bowers, Law of Waiver*, § 1.

⁴ *Traynor v. Johnson*, 38 Tenn. 51; *Collins v. Lowry*, 78 Wis. 329, 47 N. W. 612.

not aware of the facts. Knowledge of all the facts is one of the essentials of a waiver. "While it is the general rule that in order for the acts or words of a person to be binding upon him as a waiver, he must have acted or spoken with full knowledge of the existence of facts and circumstances attending the creation and continuance of the right he is alleged to have waived, still any action, though taken in real ignorance of his right, will be held a waiver where knowledge is presumed or imputed to the party from the circumstances of the case, or by virtue of law, or where it is his duty to inform himself and he has failed to do so."¹ But his knowledge of the facts once being shown, a plaintiff's resumption of ownership will defeat his right of recovery in trover.² Likewise, the ratification of a tortious act will preclude the owner from recovering in this action.³ Various acts of the owner may be a sufficient ratification to work this result. Thus, where plaintiff had let to defendant a horse to go an agreed distance, but defendant went further, thereby converting the horse to his own use, plaintiff accepted pay for the whole distance traveled, and was thereby held to have waived the conversion and consequently debarred himself from recovering in trover.⁴

§ 571. **Acquiescence in Wrongful Act.** — While a party's neglect to sue for a conversion does not bind him as an acquiescence in the other's misconduct, nor amount to a ratification of it;⁵ yet in a case where a railroad contractor took ties for building the road, which taking was known to the owner of the ties before the road was delivered to the railroad company, it was held that he could not, after the road had been delivered, and the ties attached more firmly to the ballasting, recover in trover against the company.⁶ But it has been held that if, during the pendency of a suit for the conversion by mis-use of a thing hired the hirer receives pay for the bailment, the pendency of the suit will prevent the acceptance of pay from amounting to a waiver of the right to proceed.⁷ And where the owners of converted property proposed to the tort-feasors to acknowledge their title and hold it for them, it was held that this did not constitute a waiver of the conversion, it not being shown that the proposal was assented to or acted upon.⁸

¹ Law of Waiver, *supra*, § 3.

² *Bell v. Summings*, 35 Tenn. 275. See, however, *Merrill v. How*, 24 Me. 126.

³ *Hewes v. Parkman*, 37 Mass. 90.

⁴ *Ratch v. Hawes*, 29 Mass. 136, 22 A. D. 414; *Moore v. Hill*, 62 Vt. 424, 19 Atl. 997; *Fail v. McArthur*, 31 Ala. 26.

⁵ *Mott v. Cook*, 10 N. Y. St. R. 590.

⁶ *Detroit, etc. Co. v. Busch*, 43 Mich. 571, 6 N. W. 90.

⁷ *Harvey v. Epes*, 12 Gratt (Va.). 153.

⁸ *Hotchkiss v. Hunt*, 49 Me. 213; *Freeman v. Peckham*, 47 Ind. 147.

§ 572. **Demand for Return of Property.** — Nor will a subsequent demand for the property operate as a waiver of a previous conversion.¹ “We know of no case where it is held that a demand on the part of the owner for a return of his property, or any other effort made by him for its recovery, would be of itself a waiver of a previous conversion. The law attaches no such penalty to attempts by the owner of wrongfully appropriated property to recover its possession. Demand must be made in a large class of cases before an action can be maintained for conversion. Still the demand and refusal do not in themselves constitute the conversion, but are only the evidence of it. And it cannot be held that the demand which the law requires to be made before suit should of itself operate to bar the right of action.”²

§ 573. **Release from Liability.** — Where a promissory note had been collected from the maker by one who had converted it, a release of the maker from further liability to the real owner was held not to amount to a waiver of the conversion.³ But where ore belonging to plaintiff had been wrongfully carried away by another but under a claim of right, and a bond was given by the latter to pay for the ore if it should be determined not to belong to him, it was held that the acceptance of such bond limited the plaintiff's right of action and he was precluded from proceeding in trover against a purchaser of the ore.⁴

§ 574. **Suing in Assumpsit; View that Property must have been Sold.** — Where personal property has been wrongfully taken and converted the owner has his election to sue in tort for the conversion, or he may waive the tort and sue in assumpsit on an implied contract to pay the reasonable value of such property.⁵ That the owner of property wrongfully obtained by another may waive his right of action for the wrong and sue for the value of the property is a principle upon which all the courts agree, with the proviso that the property has been changed into money or its equivalent by the wrongdoer.⁶ But on this proviso there is a hopeless division of opinion. It was in an early day universally held that unless the property had

¹ *Manwell v. Briggs*, 17 Vt. 176.

² *Cobb v. Wallace*, 45 Tenn. 539, 98 A. D. 435.

³ *Allison v. King*, 25 Ia. 56.

⁴ *Briggs Iron Co. v. No. Adams Iron Co.*, 66 Mass. 114.

⁵ *Fountain v. Sacramento*, 1 Cal. App. 461, 82 Pac. 637, citing: *De La Guera v. Newhall*, 55 Cal. 20; *Fratt v. Clark*, 12 Cal. 89; *Pomeroy's Rem. & Rem. Rights*, 568-571.

⁶ *Bowers*, Law of Waiver, 348, citing: *White v. Brooks*, 43 N. H. 402; *Staat v. Evans*, 35 Ill. 455; *Crow v. Boyd*, 17 Ala. 51; *Halleck v. Mixer*, 16 Cal. 574; *Shaw v. Coffin*, 58 Me. 254.

been so converted into money or its equivalent that the action must be *ex delicto* and could not be upon an implied agreement to compensate for the value of the property.¹ And this has been held even where the property had been exchanged for other property,² the court saying that a sale and an exchange were entirely different matters. And it was held that the action was not brought to recover the reasonable value of the property, but that the owner was limited in the amount of his recovery to the amount received for it by the tort-feasor.³

§ 575. **Same Subject; Where Money Converted.** — Of course, if the subject-matter of the conversion was money, the question of a sale does not arise. For the rule is said to be that where the defendant is proven to have in his hands the money of plaintiff, which *ex aequo et bono* he ought to refund, the law conclusively presumes that he has promised to do so, and the jury are bound to find accordingly, and after verdict the promise is presumed to have been actually proved. So, if money of the plaintiff has in any other manner come to the defendant's hands, for which he would be chargeable in tort, the plaintiff may waive the tort and bring assumpsit on the common counts.⁴ So, in a case where bank-notes done up in a package were delivered to a carrier who, without authority, paid them to a third person for a loss at a gambling game, a judgment in assumpsit was sustained in favor of the owner against one thus receiving them. The court remarked that trover would have been the better action but for the difficulty of identifying bank-notes, and continued: "We do not see, however, why the action for money had and received will not lie. The notes were paid and received as money, and as to any want of privity or an implied promise, the law seems to be that where one has received money of another, and has not a right conscientiously to retain it, the law implies a promise that he will pay it over."⁵

§ 576. **Same Subject; Affirming Sale.** — The whole extent of the doctrine as gathered from the books seems to be that one whose

¹ Bowers law of Waiver, 348, citing: *Jones v. Hoar*, 5 Pick. 289; *Watson v. Stever*, 25 Mich. 386; *Moses v. Arnold*, 43 Ia. 187; *Pike v. Wright*, 29 Ala. 332; *Mann v. Locke*, 11 N. H. 246; *Randolph v. Elliott*, 34 N. J. L. 184; *Center Turnpike Co. v. Smith*, 12 Vt. 212; *Webster v. Drinkwater*, 5 Greenl. 319, 17 A. D. 238; *Stearns v. Dillingham*, 22 Vt. 624, 54 A. D. 88.

² *Fuller v. Duren*, 36 Ala. 73.

³ *Rand v. Nesmith*, 61 Me. 111; *Pearsoll v. Chapin*, 44 Pa. St. 9.

⁴ 2 Greenleaf's Evidence, 13th ed. 102-120; *Lawson's Ex. v. Lawson*, 16 Gratt. (Va.) 230, 80 A. D. 702.

⁵ *Mason v. Waite*, 17 Mass. 558; *Johnson, etc. Co. v. Cent. Bank*, 116 Mo. 558, 38 A. S. R. 615; *Calais v. Whidden*, 64 Me. 249; *Eagle Bank v. Smith*, 5 Conn. 71, 13 A. D. 37; *Taum v. Kellogg*, 49 Mo. 118.

goods have been taken from him or detained unlawfully, whereby he has a right to an action of trespass or trover, may, if the wrong-doer sell the goods and receive the money, waive the tort, affirm the sale and have an action for money had and received for the proceeds.¹ Where the lower court had held plaintiff entitled to recover in assumpsit for logs wrongfully taken by the defendant but not sold by him, Cooley, J. in reversing the judgment said: ² "There are not wanting decisions which support the ruling of the Circuit Judge; but the weight of authority, as well as the tendency of recent decisions, is the other way. If one has taken possession of property and sold or disposed of it, and received money or money's worth therefor, the owner is not compelled to treat him as a wrong-doer, but may affirm the sale as made on his behalf, and demand in this form of action the benefit of the transaction. But we cannot safely say the law will go very much further than this in implying a promise where the circumstances repel all implication of a promise in fact. Damages for a trespass are not in general recoverable in assumpsit; and in the case of taking of personal property it is generally held essential that a sale by the defendant should be shown."³ And it is said that proof of a tortious taking of property, where the property has not been sold by the wrong-doer, will not support an averment of a contract, and where the petition negatives the fact of a contract, and there has been no sale of the property, an averment of a contract must be treated as surplusage.⁴

§ 577. **Same Subject.** — Judge Cooley, in his text on Torts,⁵ has this to say upon the question: "Now, in looking at the facts of this case, we find that one person has sold something belonging to another, and received and retained the money for it. On the facts thus stated the law will unquestionably raise an implication of promise to pay the money to the party entitled to it. This implication under ordinary circumstances would be conclusive, and would support an action of assumpsit. Now, can it be any answer to such an action for the defendant to say, 'true, I have turned your property into money, but I did so in denial of your right; I did so with intent to

¹ *Jones v. Hoar*, 5 Pick. 285, one of the earliest cases in this country sustaining the view that the defendant must have converted the goods into money or its equivalent before plaintiff can waive the tort and sue in assumpsit. A full review of the authorities is given in this case.

² *Watson v. Stever*, 25 Mich. 386.

³ Citing, *id. al.*: *Pearsoll v. Chapin*, 44 Pa. St. 9; *Balch v. Patten*, 45 Me. 41; *Fuller v. Duren*, 36 Ala. 73; *Smith v. Smith*, 43 N. H. 536; *Barlow v. Stalworth*, 27 Ga. 517; *Tucker v. Jewett*, 32 Conn. 563; *O'Reer v. Strong*, 13 Ill. 688.

⁴ *Moses v. Arnold*, 43 Ia. 187, 22 A. R. 239.

⁵ 107-108.

deprive you of the proceeds; in other words, I insist upon having done it as a wrong and repudiate all suggestion of agreement to pay'? The answer appears to be this: If there are in the case all the elements of an implied contract, it is of no consequence that there is, over and beyond those, some other fact or circumstance not in any way militating against the plaintiff's claim, but rather the reverse, which constitutes a tortious element and might support an action as for a tort. Here, as the defendant cannot possibly be prejudiced by that course, the plaintiff may ignore the tortious element and rely solely upon the facts which support the implication of a promise. He may waive that which rendered the act, in the legal sense, wrongful, and rely upon the remainder. No question is made of this doctrine where, as a result of the tortious act, the defendant has come into possession of money belonging to the plaintiff. The law will not permit him to deny an implied promise to pay this money to the party entitled."¹

§ 578. **Same Subject; Goods Purchased through Fraud.** — Upon the principles adhered to by the line of authorities now being considered, it is the rule in cases where goods have been purchased through the fraud of the vendee that in order to give the vendor the right of election between assumpsit for the value of the goods and trover for their conversion, the goods must have been sold and turned into money.² And it is said that where goods are fraudulently procured to be sold on credit, the vendor cannot sue for the price before the credit has expired, but he must sue in tort for the value of the goods, for by declaring for the price he affirms the contract, and where there is an express contract, the law will not imply any other.³ "Where goods have been obtained through the fraud or misrepresentation of the vendee, the vendor may either affirm the sale or rescind it and reclaim the goods. If he elect to rescind, he must, as we have seen, do so within a reasonable time, and must take care to do nothing affirmatory of the contract or his right to rescind will be lost. And in such case he should sue in trover or replevin for the goods, treating the whole contract as nullified by the fraud, and he should be careful not to bring assumpsit, since, as the foundation of this action is the promise of the vendee, the contract is thereby

¹ Citing, *id al.*: *Hall v. Peckham*, 8 R. I. 370; *Howe v. Clancy*, 53 Me. 130; *Miller v. Miller*, 9 Pick. 34; *Staat v. Evans*, 35 Ill. 455; *Thurston v. Blanchard*, 22 Pick. 18; and see, also: *Mann v. Locke*, 11 N. H. 246; *Tucker v. Jewett*, 32 Conn. 563; *Pike v. Bright*, 29 Ala. 332; *Miller v. King*, 67 Ala. 575; *Doon v. Ravay*, 49 Vt. 293; *Sleeper v. Davis*, 64 N. H. 59, 6 Atl. 201, 10 A. S. R. 377.

² *Creel v. Kirkman*, 47 Ill. 344; *Johnston v. Salisbury*, 61 Ill. 316.

³ *Chitty, Contracts*, 569-570.

directly affirmed, and his rights will depend upon the contract solely."¹ And it is said that if the plaintiff rescinds the contract, as he would have a right to do, the defendant failing to perform the condition of the sale, his proper remedy for a conversion of the property is an action of trover. And he cannot waive the tort and recover the value of the goods in an action of assumpsit. In such a form of action the contract is admitted to exist at the time of the action, and where there is an express contract the law will not imply one.²

§ 579. **Where Goods Used but Not Sold.** — So, in a case where property had been simply wrongfully taken and used by the defendant, but not sold, the Vermont court said in reply to the contention of counsel that the tort could be waived and assumpsit maintained: "We do not understand this doctrine of waiving tort and suing in assumpsit ever to have been carried to this extent in this state. The farthest it has gone has been to allow the owner of the property, when it has been tortiously taken and converted into money, to maintain assumpsit for money had and received against the wrong-doer; and this is founded mainly, as we think, upon the equitable ground which is said to be the foundation of the action — that the defendant has money in his hands which in equity belongs to the plaintiff. To carry the doctrine to the extent claimed would be to abolish all distinction between actions *ex delicto* and *ex contractu* and we do not see any necessity for such a wide departure from what we deem to be the settled law upon the subject."³ In further support of the proposition that before the conversion can be waived and assumpsit maintained as upon an implied contract, see the cases cited in the note below.⁴

§ 580. **View that Property Need Not have been Sold by Wrong-doer.** — The cases so far cited adhere to the principle that unless the property converted has been sold and turned into money or its equivalent by the wrong-doer, the owner cannot waive the tort and sue in assumpsit; and these courts proceed on the theory that only the action for money had and received may be substituted for the

¹ Story, Sales, 446.

² Allen v. Ford, 19 Pick. 217. See Delton v. Hull, 47 Md. 112.

³ Scott v. Lance, 21 Vt. 507, followed in Stearns v. Dillingham, 22 Vt. 624, 54 A. D. 88; the rule of these cases being that to permit the waiver, the property must have been converted into money or its equivalent. For what is held to be equivalent to money for this purpose, see Burnap v. Partridge, 3 Vt. 144.

⁴ Knapp v. Hobbs, 50 N. H. 476; Robertson v. Dunn, 87 N. C. 191; Watson v. Stever, 25 Mich. 386; Chamblee v. McKenzie, 31 Ark. 155; Quimby v. Lowell, 89 Me. 547, 36 Atl. 902; Grinnell v. Anderson, 122 Mich. 533, 81 N. W. 329; Weiler v. Kershner, 109 Pa. St. 219; Crow v. Boyd, 17 Ala. 51; Daniel v. Daniel, 9 B. Mon. 195; Williams v. Rogers, 110 Mich. 418, 68 N. W. 240; Creel v. Kirkham, 47 Ill. 344; Rogers v. Greenbush, 57 Me. 441.

action of trover. Or, as one of them has said: "But it is only in favor of the action for money had and received which has been likened in its spirit to a bill in equity, that the rule is relaxed that the evidence must correspond with the allegations and be confined to the matter in issue; and this relaxation, by which a party is allowed to aver a promise and recover for a tort, being a departure from principle and the correct rules of pleading, ought not to be extended to new cases."¹ Judge Freeman, in an extended note to a case included in the American Decisions,² offers this explanation of the doctrine of these courts: "The reason of this restriction may be either the reluctance to broaden what is regarded as an exception to the general rules of pleading and of evidence, or the fear that by permitting the plaintiff to declare as upon a sale inconvenience would thereby result to the defendant. That the defendant is not prejudiced by waiving the tort and demanding of him, under the form of a preceding *ex contractu*, what he has received, is repeatedly asserted as an important ground for entertaining the action for money had and received. The inconvenience that might follow to the tortious actor by the waiver of the wrong, and the raising the presumption of a sale is thus pointed out by Lord Alvanley in *Bennett v. Francis*, 2 Bos. & P. 550, 555: 'All that can be collected from the cases is this, that if the goods be converted into money, the court will allow the plaintiff to waive the tort and bring an action in which he can recover nothing more than the sum actually received. But if it were competent to the plaintiff in a case like this to waive the tort and convert the transaction into a contract, it might involve the defendant in great difficulties. Goods are demanded of a person who claims them as his own and insists on keeping them. Now, if the party demanding the goods be at liberty to convert this into a contract for goods sold and delivered the consequence would be that on proving his property in the goods the other party would be obliged to pay the value of them though possibly to his utter ruin; whereas, if the former had declared in trover nominal damages only would probably be given and the goods would be restored.'"

§ 581. **Same Subject.** — While adhering to the doctrine in general as hereinbefore outlined, the Michigan court has found and declared an exception in which the tort may be waived and assumpsit maintained, even though the converted goods have not been sold. Thus, it has been said: "The general rule is that before a party can waive a tort for the conversion of personal property and bring assumpsit,

¹ *Fuller v. Duren*, 36 Ala. 73.

² *Webster v. Drinkwater*, 5 Greenl. 322, 17 A. D. 244.

the property in the hands of the tort-feasor must have been sold and converted into money upon the theory that the money has been received for the plaintiff's use. There is, however, another class of cases where the property has been converted but not sold, where the tort may be waived and assumpsit brought for the value of the goods converted. This class belongs to those relations where a contract may exist, and at the same time a duty is superimposed or arises out of the circumstances surrounding or attending the transaction, the violation of which duty would constitute a tort. In such cases the tort may be waived and assumpsit be maintained for the reason that the relation of the parties, out of which the duty violated grew, had its inception in contract. These relations are usually those of trust and confidence, such as those of agent and principal, attorney and client, or bailee and bailor."¹

§ 582. **Same Subject; Waiver is on Theory of Implied Contract.** — The authorities on both sides of the question under consideration are agreed that if the tort can be waived it must be upon the theory of an implied contract to pay for what has come to the tort-feasor by reason of the conversion. Or, as said by one court: "It is a principle well settled that a promise is not implied against or without the consent of the person attempted to be charged by it. And where one is implied, it is because the party intended it should be, or because natural justice plainly requires it in consideration of some benefit received."² The authorities being thus far, and thus far only, in accord, their division arises over what is and what is not the receipt of a sufficient benefit to impose liability in assumpsit upon a converter of goods, at the election of the owner. Thus, even where the goods had been actually sold by the wrong-doer — a commission merchant — who had received mortgaged goods sent him for sale without the knowledge or consent of the mortgagee, and had paid the proceeds of the sale, less his commission, to the consignor without notice of the mortgage, it was held that he did not receive such a benefit from the transaction as to authorize the mortgagee to waive the tort and recover in an action upon an implied contract.³ But it has been held that where a mortgagor, without the knowledge or consent of the mortgagee, sells the mortgaged property and the

¹ Tuttle v. Campbell, 74 Mich. 652, 16 A. S. R. 652, citing: Fiquet v. Allison, 12 Mich. 328, 86 A. D. 54; Coe v. Wager, 42 Mich. 49; McLaughlin v. Salley, 46 Mich. 219.

² Webster v. Drinkwater, 5 Greenl. 322, 17 A. D. 244.

³ Greer v. Newland, 70 Kan. 310, 77 Pac. 98, 78 Pac. 835, 109 A. S. R. 424; this, however, appears to be a very extreme case, as a commission merchant, the same as any other dealer in personal property, must look to the title of him from whom he receives possession, under the rule of *caveat emptor*.

purchase-price remains unpaid, the mortgagee may waive the tort and sue the purchaser for the purchase-money.¹

§ 583. **Same Subject.** — The cases adhering to the old rule maintain that the waiver can operate only in favor of an action as for money had and received to the use and benefit of the owner of the chattels, and that unless this fiction can be indulged, the owner must sue in trover. But no good reason appears why there may not be the same implication to pay the reasonable value of the goods as if they had been sold to the wrong-doer himself, in which event the action would not be for money had and received, but for goods sold and delivered. This, in fact, is the view expressed by most of the modern courts. The delivery of the goods to the tort-feasor, though fictitious, and though the latter's possession is in truth without the consent of the owner and against his will, is regarded as ratified by the owner when he exercises his election to sue in assumpsit, and the property thereupon passes as absolutely to the wrong-doer as if the sale and delivery to him had been according to a previous agreement. This doctrine was announced in a New York case, in which it was said:² "As the defendants had not, after their conversion, themselves sold or otherwise disposed of the property which they acquired from the plaintiffs, the fiction of the receipt by defendants of money for the sale of the property, which *in aequo et bono* they ought to pay back to plaintiffs and which they, therefore, impliedly promised to pay back, could not be indulged in, and the position of the parties would have been, at one time, the subject of some doubt whether there was any foundation for the doctrine of an implied promise in such case, or any possibility of the waiver of the tort committed by the defendants in the conversion of the property. In some of the states it has been denied, and such denial placed upon the ground that the property remained in the hands of the wrong-doer, and therefore no money having been received by him in fact, an implied promise to pay over money had and received by defendant, to the plaintiff's use, did not and could not arise. Such was the case of *Jones v. Hoar*, 5 Pick. 285. But the great weight of authority in this country is in favor of the right to waive the tort even in such case. If the wrong-doer has not sold the property, but still retains it, the plaintiff has the right to waive the tort, and proceed upon an implied contract of sale to the wrong-doer himself, and in such event he is not charged as for money had and received by him to the use of the plaintiff.

¹*Chittenden v. Pratt*, 89 Cal. 178, 26 Pac. 626; *McArthur v. Murphy*, 74 Minn. 53, 76 N. W. 955.

²*Terry v. Munger*, 121 N. Y. 161, 24 N. E. 272, 18 A. S. R. 803, 8 L. R. A. 216.

The contract implied is one to pay the value of the property, as if it had been sold to the wrong-doer by the owner. If the transaction is thus held by the plaintiff as a sale, of course the title to the property passes to the wrong-doer when the plaintiff elects to so treat it.¹ We think the rule should be regarded as settled in this state. The reasons for the contrary holding are as well stated as they can be in the case above cited from Massachusetts,² and some of the cases looking in that direction in this state are cited in the opinion of Talcott, J. in the case of *Abbott v. Blossom*, 66 Barb. 353. We think the better rule is to permit the plaintiff to elect and to recover for goods sold, even though the tort-feasor has not himself disposed of the goods."

§ 584. **Same Subject; Where Property Severed from Realty.** — So, it is said that the doctrine that in cases where property has been severed from real estate by a wrong-doer, carried from the freehold and converted to his own use, the rightful owner may sue and recover its value as on an implied contract, is well established.³ And where one had torn down the fence of another and turned his cattle on the latter's pasture, a bill for pasturage was allowed as a counterclaim in an action brought by the former.⁴ Where plaintiff raised a crop on shares on defendant's land, and the latter wrongfully took possession of the entire crop, the plaintiff was permitted to sue for the value of his part of the crop.⁵ A person receiving money from another for a particular purpose, to which he does not apply it, may be sued either for money had and received or for a breach of trust.⁶ A bank paying a deposit to the wrong person may be sued by one entitled to it as a debtor for the deposit, or the person receiving the money may be sued for money had and received; but by electing to bring one action, the owner waives the other.⁷

§ 585. **Same Subject.** — Street, in his excellent work on Foundations of Legal Liability, Vol. 2, p. 216, has this to say: "If the tort-feasor appropriates money, he may be sued for money had and received; and if by sale he wrongfully converts chattels into money or its equivalent, the same form of action is proper. If, however, the tort-feasor, instead of selling the disseised chattels for money or

¹ Citing: *Pomeroy's Rem. & Rem. Rights*, 2d ed. 567-569; *Putnam v. Wise*, 1 Hill 240, 37 A. D. 309; *Berly v. Taylor*, 5 Hill 577; *Abbott v. Blossom*, 66 Barb. 353.

² *Jones v. Hoar*, 5 Pick. 285.

³ *Bowers, Law of Waiver*, § 350, citing *Downs v. Finnegan*, 58 Minn. 113, 59 N. W. 981, 49 A. S. R. 488, 22 Am. & Eng. Enc. L. 389.

⁴ *Norden v. Jones*, 33 Wis. 600, 14 A. R. 782.

⁵ *Fiquet v. Allison*, 12 Mich. 328, 86 A. D. 54; *McLaughlin v. Salley*, 46 Mich. 219.

⁶ *Taylor v. Benham*, 5 How. 233, 12 L. Ed. 130 (U. S.).

⁷ *Fowler v. Bowery Savings Bank*, 113 N. Y. 450, 21 N. E. 172, 10 A. S. R. 479, 4 L. R. A. 145.

its equivalent, retains them in his own hands and appropriates them to his own individual use, or if he exchanges them by barter for other goods, the count for money had and received is plainly improper. A clear perception of this fact together with the circumstance that the count for money had and received was the first and for a long time the only form of *indebitatus* which was used where the tort was permitted to be waived, led a number of American courts to declare in the early part of the nineteenth century that no form of *indebitatus* will lie against a converter unless he sells the chattels and turns them into money or its equivalent, such being in the opinion of these courts the only situation where the law will impose a contractual duty upon the disseisor of chattels. But by the weight of modern authority, the plaintiff may declare in *indebitatus* against any disseisor of chattels, using the count for goods sold and delivered, the sale of course being a fiction.”¹ The author adds: “This is undoubtedly good law.”

§ 586. **Same Subject.** — One of the courts to lately maintain this doctrine has reasoned thus: “Wherever there is a conversion for which an action of tort would lie, the tort may be waived and *assumpsit* brought regardless of whether the property has been sold, consumed or changed in form. The real question is, has the wrong-doer’s act raised an implied promise? It is not easy to see why it should be said that the act had raised such promise when followed by sale or destruction of the property, and yet there is no promise when the conversion is not followed by those acts. In either case the owner is effectually deprived of his property; and the moral reason preventing one from denying a legal promise to pay in one instance is no stronger than in the other. The entire rule is a legal fiction based upon a moral principle, and there seems no reason why it should be limited as has been done in the adjudications to which we have referred. So it is said in *Haebler v. Meyers*, 132 N. Y. 363, that the law implies a promise because in equity and good conscience the wrong-doer ought to have promised, and it will not permit him to say that he did not.”² And where this rule prevails, the defendant

¹ Citing: *Logan v. Wallis*, 76 N. C. 416; *Alsbrook v. Hathaway*, 3 Sneed (Tenn.) 454; 15 Am. & Eng. Enc. L. (2d ed.), 1116.

² *Crane v. Murray*, 106 Mo. App. 697, 70 S. W. 280. While the later cases in the state of Illinois support this doctrine: *Elgin v. Josylin*, 136 Ill. 525, 26 N. E. 1090; *Toledo Railway Co. v. Chew*, 67 Ill. 378; the earlier decisions were to the contrary: *Johnston v. Salisbury*, 61 Ill. 316; *Morrison v. Rogers*, 3 Ill. 317. And in Alabama, while the cases from that state referred to in the preceding sub-division do not support the doctrine of this section, yet the case of *Bradfield v. Patterson*, 106 Ala. 397, 17 So. 536, holds that the wrong-doer, as a purchaser, may be held to account for their value at the election of the owner who, upon such election, waives the tort.

will not be permitted to set up that he obtained the goods wrongfully.¹

§ 587. **Same Subject.** — The Mississippi court has concurred in this doctrine in language as follows: "The action of assumpsit can be maintained though there was no actual conversion of the trees into money. It is held by many courts of high authority that a tort can only be waived and an action *ex contractu* maintained where the tort-feasor has converted into money the proceeds of his wrongful act, and has thus subjected himself to an action for money had and received. An intimation of this sort was thrown out in *O'Conley v. City of Natchez*, 1 Sm. & M. 46, and again in *Mhoon v. Greenfield*, 52 Miss. 440, and certainly is supported by many adjudicated cases in England and America. A more liberal, and we think a more sensible rule, is laid down by the late text writers, and sustained by many courts, to the effect that the tort may be waived and assumpsit maintained whenever the property taken has been converted either into money or into any other beneficial use by the wrong-doer; and especially where it has been so applied to his use as to lose its identity.² It is impossible to perceive any valid objection to this doctrine. So long as the trespasser retains, in its original shape, the property taken, he may logically deny that he holds it under contract and demand that he be proceeded against in tort, and that the tort be established against him; but when he has parted with it, either for money or other property, or when he has mingled it with his own, consumed it in its use, or changed its form, he should not be permitted to deny his assumption to pay its value which the law imputes from his method of dealing with it. It is indeed greatly to his advantage to be sued in assumpsit rather than in trespass or trover, since in the former action he escapes all claims for damages, obtains the right to set-off and can be held only for the actual value of the property."³

§ 588. **Same Subject.** — Similarly, the California court has said: "The plaintiff seeks to bring the case within the rule that where personal property is wrongfully converted, the injured party may 'waive the tort and sue in assumpsit.' In many jurisdictions this doctrine is limited to cases where the wrong-doer has sold the prop-

¹ *Tightmeyer v. Mongold*, 20 Kan. 90; *Gordon v. Bruner*, 8 Ark. 202.

² Citing, *Cooley on Torts*, 95; *Greenleaf, Evidence*, § 108, note 5; *Hilliard, Torts*, 42.

³ *Evans v. Miller*, 58 Miss. 120, 38 A. R. 313. To the same effect, see: *Galvin v. Mac. Min. Co.*, 14 Mont. 508, 37 Pac. 366; *Challiss v. Wylie*, 35 Kan. 506, 11 Pac. 428; *McCombs v. Guild*, 9 Lea 81 (Tenn.); *Phelps v. Church, etc.*, 99 Fed. 683, 40 C. C. A. 72; *Avery v. McClure*, 94 Miss. 172, 47 So. 901, 22 L. R. A. (N. S.) 256, 19 Ann. Cas. 134.

erty or otherwise converted it into money, in which event the plaintiff may maintain an action for the proceeds.¹ In this state, however, as in a number of others, a broader rule enables one whose goods are wrongfully taken and used by another to sue in assumpsit for their value as for goods sold and delivered.² But the application of this rule, even in its more liberal form, cannot be extended to a case where plaintiff has voluntarily parted with his property in exchange for something received by him in return. The very basis of the 'waiver of tort' is that plaintiff consents to the taking of his property and affirms the act of the wrong-doer. He treats it as a sale and recovers the value due him under an implied contract of sale. But where he has actually agreed to exchange, which is executed, his affirmance of the transaction is an affirmance of it as a whole. Having parted with his property for an agreed consideration, he cannot, while relying upon his transfer as one made pursuant to contract, hold the defendant to the payment of any other consideration than the one agreed upon. No contract will be implied by the law as against an express contract not disavowed by either party."³

§ 589. **Effects of Waiver.** — The question of the effect of the election of remedies in cases of conversion becomes important where more than one person is concerned in the wrong. In Tennessee it has been held by a learned judge that the commencement of an action against one tort-feasor upon the quasi-contractual duty to compensate for goods wrongfully converted does not operate as a waiver of the right to proceed in tort against joint trespassers.⁴ But in New York it has been held that the recovery of judgment in assumpsit against one of several joint tort-feasors bars the right to sue the others for damages occasioned by the conversion. Thus, in *Terry v. Munger*,⁵ it appeared that three persons had been jointly guilty of detaching and carrying away certain mill machinery belonging to the plaintiff. The latter thereupon sued two of them upon the implied contract to compensate for the machinery taken. This action, it will be noted, proceeded upon the idea of a fictitious sale. Subsequently, in an action *ex delicto* brought by the same plaintiff against the third tort-feasor, it was held that by electing to treat the conversion as a sale, the plaintiff was precluded from thereafter

¹ Citing 4 Cyc. 332.

² Citing *Roberts v. Evans*, 43 Cal. 380; *Lehmann v. Schmidt*, 87 Cal. 15, 25 Pac. 161; *Chittenden v. Pratt*, 89 Cal. 178, 26 Pac. 626.

³ *Bechtel v. Chase*, 156 Cal. 707, 106 Pac. 81. See: *Reynolds v. N. Y. Trust Co.*, 188 Fed. 611, 110 C. C. A. 409, 39 L. R. A. (N. S.) 391; *Isaacs v. Hermann*, 49 Miss. 449; II Mechem, Sales, art. 909; *Kellogg v. Turpie*, 93 Ill. 265, 34 A. R. 163.

⁴ *Huffman v. Hughlett*, 11 Lea 549.

⁵ 121 N. Y. 161, 24 N. E. 272, 18 A. S. R. 803, 8 L. R. A. 216.

proceeding in tort. The fact that no satisfaction had been obtained as a result of the first proceeding was held to be immaterial.¹

§ 590. **Same Subject.** — The election of remedies between the rights arising *ex delicto* and *ex contractu*, which election results necessarily in the waiver of one, can be indicated only by the theory of the pleadings which the plaintiff adopts. Nothing can be ascertained from the form of the pleadings under the code, for there is but one form of action, and the election or character of the action is to be determined from the general scope and tenor of the pleadings.² The results of electing between such remedies may be far reaching, as defenses may be made to one action which could not be made to another; as where an infant is sued in contract instead of in tort, the plea of infancy might release him from liability while it would not if the remedy in tort had been chosen.³ And a right of set-off may exist in an action *ex contractu* which could not avail in an action *ex delicto*.⁴ And an action on contract might let in a plea of the statute of limitation not available in an action in tort.⁵ And a judgment in an action on contract might be defeated by a plea of exemption which could not be invoked in an action in tort.⁶ While the results of a waiver of the right to sue in tort consequent upon an election to proceed in contract are permanent and irrevocable, a plaintiff is not always precluded from choosing a second time where his defeat in the first choice was solely because he did not pursue the proper remedy.⁷

§ 591. **Whether Election of One Remedy Waiver of Others.** — It will thus be seen that there is a difference of opinion among the courts as to whether an election to pursue one remedy is an irrevocable waiver of the right to later pursue the other. The weight of authority, and undoubtedly the logic of legal reasoning, determine that where the plaintiff has seen fit to ignore the tort and bring an action upon an implied contract of sale, if the action be prosecuted to judgment, such judgment will be a bar to any further action between the same parties upon the same state of facts.⁸ Better reason

¹ II Street's Foundations of Legal Liability, 218, criticising the case of Terry v. Munger, *supra*.

² Neidefer v. Chastain, 71 Ind. 363, 36 A. R. 198.

³ Walker v. Davis, 1 Gray 506; Vasse v. Smith, 6 Cranch 225; Elwell v. Martin, 32 Vt. 217; Studwell v. Shapter, 54 N. Y. 249; Carpenter v. Carpenter, 48 Ind. 496.

⁴ Chambers v. Lewis, 11 Abb. Pr. 206; Allen v. Randolph, 48 Ind. 496.

⁵ Huffman v. Hughlett, 11 Lea 549; Lane v. Boicourt, 128 Ind. 420.

⁶ Warner v. Cammack, 37 Ia. 642; Schonton v. McIntosh, 89 Ind. 593; Davis v. Henson, 29 Ga. 345.

⁷ Farwell v. Myers, 59 Mich. 179; Bulkley v. Morgan, 46 Conn. 393; Baley v. Hervey, 135 Mass. 172; Strong v. Strong, 102 N. Y. 69.

⁸ Thomas v. Watt, 104 Mich. 201, 62 N. W. 345; Roberts v. Moss, 127 Ky. 657, 106 S. W. 297, 17 L. R. A. (N. S.) 280; Finlay v. Begson, 84 Mo. 664; Warren v. Landry, 74 Wis. 144, 42 N. W. 247; Cooper v. Smith, 109 Mich. 458, 57 N. W. 516.

also indicates that if the action has not gone to judgment, the plaintiff should have the right to dismiss and proceed against the same party in the other character of action; and also that if a judgment in either action against one of several joint tort-feasors has not been satisfied, such judgment should not preclude the plaintiff from proceeding against the other wrong-doer either *ex delicto* or *ex contractu*.

§ 592. **Same Subject.** — But another question that has arisen is whether a plaintiff can procure satisfaction or partial satisfaction in one action and then proceed for additional satisfaction in the other action. This matter was presented to the Maine court in a case against assessors of a town for the conversion of shares of corporate stock in which it appeared that plaintiff had previously recovered judgment in assumpsit against the town, which judgment had been satisfied. The court said: "The property of the plaintiff having been seized and sold to pay an illegal assessment, the assessors having no jurisdiction, the plaintiff had two remedies, either of which he could pursue. He might sue the assessors in tort, or, waiving the tort, he might bring assumpsit against the town for the proceeds of the property sold. The damages are determined upon different principles, as the remedies pursued are in tort or assumpsit. Electing one of two forms of action, the party elects that his damages shall be determined by the rules which govern in assessing damages in the remedy adopted. The plaintiff, having his election as to the remedy to be pursued, brought his action of assumpsit, pursued it to judgment, and has received full satisfaction of the execution issued upon such judgment. In that suit, the tort being waived, he recovered judgment only for the proceeds of the stock sold and interest thereon. Having thus affirmed the sale by claiming the proceeds, and receiving the same, he now in this action demands damages for the tort heretofore waived. But the plaintiff, having elected his remedy and received the satisfaction which the law gives in such case, cannot revive his cause of action. A claim arising from one entire and continuous tortious act cannot be divided into distinct demands and made the subject of separate actions. A plaintiff cannot divide his cause of action, recover compensation in assumpsit by waiving the tort, and then, having received such compensation, resort to the tort which has been waived, and in that again recover compensation as though the tort had not been waived. He cannot waive all wrong-doing and recover compensation on that basis, and then treating the tort once waived as a subsisting grievance, recover damages which are to be assessed upon different principles. Neither can he recover part compensation in assumpsit, thus waiving his tort,

and then, resorting to it as an existing wrong, recover the residuum of damages in another form of action. He cannot split his cause of action into fractional parts, and recover for such fractions in different suits upon different grounds of action. Having sought and obtained the redress which the form of action first chosen gave him, he cannot be permitted again to renew litigation for a grievance once waived and without the waiver of which he was not entitled to recover."¹

§ 593. **Same Subject.** — The principle involved in the above case is discussed somewhat at length by Mechem in his work on Sales in which he says:² "This question arose in *Farwell v. Myers*.³ Here a debtor had made a general assignment for the benefit of his creditors. Four days afterwards, J. V. Farwell & Co., who had recently sold him goods on credit, rescinded the sale on the ground that the goods had been bought with the intention not to pay for them, brought replevin against the assignee and recovered a part of the goods. After recovering judgment in the replevin suit, Farwell & Co. filed a claim with the assignee for the whole amount of their bill, giving credit on it for the value of the goods recovered by the replevin suit. Their claim was rejected by the lower court, and the Supreme Court, while agreeing that they might have recovered for the goods unfound, on the theory of their conversion, was equally divided as to whether they could recover as for goods sold, thus affirming the decision of the court below. Said Morse, J.: 'Early in the proceedings, immediately after the assignment, the plaintiffs elected to rescind the sale of the goods and brought replevin for the same on the theory that the fraud of the defendant had vitiated the sale, and that the goods belonged to them as if no sale had been made. After thus solemnly electing their remedy, and proceeding, through a trial, to judgment upon the theory that they owned the goods, because they failed to get adequate relief in such suit, they cannot be allowed, a year afterward, to come into court and base a claim upon the inconsistent idea that the goods were sold to defendant. One theory is totally at variance with the other. If one elects between two inconsistent remedies, the right to pursue the other is forever lost.'⁴ We do not deny the right of plaintiffs to collect the balance, the value of the goods not recovered by the action of replevin in a proper action for the conversion of the same; but they cannot do so upon the claim filed with the assignee, counting upon the

¹ *Ware v. Percival*, 61 Me. 391, 14 A. R. 565.

² Vol. II, Art. 909.

³ 59 Mich. 179, 26 N. W. 328.

⁴ Citing: *Thompson v. Howard*, 31 Mich. 309; *Wetmore v. McDougall*, 32 Mich. 276; *Dunks v. Fuller*, 32 Mich. 242; *Nield v. Burton*, 49 Mich. 53, 12 N. W. 906.

original contract for goods sold and delivered. If they should elect to waive the tort and sue in assumpsit, they would not have to declare specially averring the tort.' ¹ Champlin, J. concurred. Campbell, C. J. dissented (Sherwood, J. concurring with him) saying: 'There can be no doubt that, if the contract is considered as rescinded, the goods not replevied and disposed of by defendant must be accounted for in some way. Whether treated as sold or as tortiously converted, the plaintiffs, according to well settled rules, could always sue in assumpsit for the proceeds or value, and could do so under the common counts or specially. The demand for these moneys is not one for damages at large, as for a wrong, but is a pecuniary claim based on fixed rules of recovery. . . . And it seems to me that no doctrine can be sound which puts a person to a complete election at his peril, and bars him from an adequate remedy against the wrong-doer.' The plaintiffs filed a new claim based upon the conversion. It was now objected that the former claim and adjudication were a bar, but the Supreme Court unanimously permitted a recovery.² The position taken by Morse and Champlin, JJ., seems impregnable so far as the right to take any further action on the contract is concerned, and is sustained by the weight of authority. Thus, in *Powers v. Benedict*,³ the sellers had rescinded the sale and brought replevin for their goods, but only found a part. The vendee subsequently became bankrupt, and the sellers filed a claim for the value of the goods not found. This act was relied upon by defendant to defeat the replevin suit. Said Danforth, J.: 'The bringing of this action (the replevin suit) was undoubtedly an election to disaffirm the contract and reclaim the goods. So far as the goods are retaken, it is final and conclusive. A recovery could not afterward be had either for the price agreed to be paid or that part of their value. But it is not perceived how this can aid the defendant. The plaintiffs, by an effort to retake their entire property, if successful in part only, do not lose the right to pursue the original wrong-doer for the value of the unfound portion. Nor is their effort to do so an answer to an action against one in whose hands they found that part. A wrong-doer carries away one hundred bags of grain; the owner recovers fifty by legal process from one who received it without consideration, and whose title is no better than that of the trespasser; does he thereby lose his right to recover the value of the reminder? Surely not. Nor is he bound to restore the fifty in

¹ Citing *Tregent v. Maybee*, 54 Mich. 226, 19 N. W. 962.

² 64 Mich. 234, 66 Mich. 678.

³ 88 N. Y. 605 (cited by Judge Campbell in *Farwell v. Myers*, *supra*).

order that the latter action may be maintained.¹ So, the subsequent effort of these plaintiffs to obtain, in bankruptcy, compensation for the unfound portion of their goods is no obstacle to a recovery against a third person for so much of the fruits of the fraud as is found in his hands. Nor is this conclusion against the rule of law that for one entire contract there should not be more than one action, nor concurrent suits at the same time upon one claim. The contract under which the plaintiffs parted with their goods is avoided altogether. . . . It may be conceded that the plaintiffs could neither sue the vendee for the price of goods embraced in the replevin suit nor make it the foundation of proceedings in bankruptcy. They have neither sought to do so, nor attempted to rescind in part only. They rescind altogether. If they succeed in this action they will obtain part of the goods belonging to them, and so far as they can collect in bankruptcy, it will be as compensation for goods taken and appropriated by the wrong-doer to his own use, and from which conversion the law implies a promise to pay.' . . . So, in *Sleeper v. Davis*,² it is said: 'Having rescinded the contract of sale, and not finding all the goods so as to take them in replevin, the plaintiffs might have sued in trover for the conversion of the remainder. The vendee having disposed of the goods for his own benefit, the plaintiffs might waive the tort and maintain assumpsit for the proceeds, not upon the original contract of sale which had been rescinded, but upon the implied promise to pay for property wrongfully appropriated.' ”³

¹ *Kinney v. Kierman*, 49 N. Y. 164.

² 64 N. H. 59, 6 Atl. 201, 10 A. S. R. 377.

³ See: *Johnson v. Stratton*, 6 Tex. Civ. App. 431; *Moreford v. Peck*, 46 Conn. 380; *Bryant v. Kenyon*, 123 Mich. 151, 81 N. W. 1093; *Knowlton v. Logansport School City*, 75 Ind. 303.

CHAPTER XI

EVIDENCE

1. BURDEN OF PROOF

- § 594. As to title.
- § 595. Same subject.
- § 596. Special interest of plaintiff.
- § 597. Same subject.
- § 598. Possession or right of possession.
- § 599. Same subject.
- § 600. Same subject.
- § 601. Various rulings on burden of proof.

2. PRESUMPTIONS

- § 602. Possession presumes title.

3. MANNER OF PROOF

- § 603. General principle.
- § 604. Parol or documentary evidence.
- § 605. Acts and declarations.
- § 606. Same subject; self-serving declarations.
- § 607. Same subject.

4. ADMISSIBILITY OF EVIDENCE

- § 608. Notice and good faith of defendant.

- § 609. Same subject.
- § 610. Same subject.
- § 611. Other similar acts by defendant.
- § 612. Indictment or acquittal of defendant on criminal charge.
- § 613. Identity of chattels involved.
- § 614. Illustrations of same subject.
- § 615. Plaintiff's title or right of possession.
- § 616. Illustrations of same subject.
- § 617. Same subject.
- § 618. Defendant's title and right of possession.
- § 619. Same subject.
- § 620. Defendant's title acquired while suit pending.
- § 621. Title and right of possession of third persons.
- § 622. Same subject.
- § 623. Same subject.
- § 624. Same subject.
- § 625. Whether proof of tortious act necessary.
- § 626. Illustrations of same subject.
- § 627. Property restored by defendant.
- § 628. Same subject.
- § 629. Variance from pleading.

1. BURDEN OF PROOF

§ 594. **As to Title.** — In an action of trover, as in an action of ejectment, the plaintiff must recover on the strength of his own title without regard to the weakness of that of his adversary. Like that, this is a possessory action, and the plaintiff must show he has either a special or general property in the thing converted, and

the right to its possession.¹ In other words, the burden of proof is upon the plaintiff to establish the fact that title to the property — either general or special — was in him at the time of the conversion. This follows the elementary rules of pleading and evidence that what is necessary for a plaintiff to plead it is necessary for him to prove, unless it be expressly or impliedly admitted by the defendant; and in cases of trover, the fact of title in the plaintiff is one of the essential allegations of the complaint. In commenting upon this requirement as to proof, one court has said: “In cases of this character, the plaintiff must recover, if at all, upon the strength of his own title, and not upon the weakness of that of his adversary. Therefore, the obligation rests upon him to sustain this burden by a preponderance of the evidence; that is, he must show by a preponderance of the evidence that he has a right superior to that of the defendant, and that the value of the property or the interest therein in question is greater than that admitted by the defendant. Hamilton being apparently in the exclusive possession, and therefore *prima facie* owner at the time the levy was made, the endeavor on the part of the defendant to show title in him was but one mode of meeting and rebutting plaintiff’s claim and after presenting their evidence they would be entitled to a verdict, if the whole of the evidence upon this issue did not show a preponderance in plaintiff’s favor.”² The defendants were not under obligation to produce any evidence until plaintiff had made out a *prima facie* case, and then to go no further than to produce sufficient evidence to show an equipoise. The burden, therefore, rested upon the plaintiff throughout. These are elementary principles applicable to all cases where there is an issue as to title, whether defendant asserts title in himself or in a third person.”³ The general rule is said to be that in an action of trover for the conversion of personal property, the plaintiff must prove either a general or special ownership in the property in controversy, and either actual possession or a right to the immediate possession thereof. And the plaintiff must prove the title and right of possession set up and relied upon by him.⁴ In accordance with this last statement it has been held that where plaintiffs alleged title by virtue

¹ Davidson v. Waldron, 31 Ill. 120, 83 A. D. 206.

² Finch v. Kent, 24 Mont. 268, 61 Pac. 653.

³ Kipp v. Silverman, 25 Mont. 296, 64 Pac. 884. See: Odiorne v. Culley, 2 N. H. 66, 9 A. D. 39; Hopkins v. Dipert, 11 Okla. 630, 69 Pac. 883; Holmes v. Bailey, 16 Neb. 300, 20 N. W. 304; Van Zandt v. Schuyler, 2 Kan. App. 118, 43 Pac. 295.

⁴ 13 Cyc. Ev. 65, and numerous cases cited. Henry v. Manistique Iron Co., 147 Mich. 509, 111 N. W. 79; Munier v. Zachary, 114 N. W. 525 (Ia.); Bibb v. Roth, 101 Minn. 111, 111 N. W. 919; Danley v. Rector, 10 Ark. 211; Hawkins Lumber Co. v. Bray, 105 Ala. 655, 17 So. 96; Kemp v. Thompson, 17 Ala. 10.

of a lien for repairs, they could not at the trial rest their case upon a mere possessory title, but must prove the particular title alleged.¹

§ 595. **Same Subject.** — Where the plaintiff claims title to goods under a sale, and a question is made as to the time when the property passed, it will be necessary for him to prove that everything which the seller had to do was already done, and that nothing remained to be done on his own part but to take away the specific goods. They must have been weighed or measured or specifically designated and set apart by the vendor, subject to his control, the vendor remaining at most but a bailee.² But if the plaintiff claim title as the holder of a negotiable instrument, it will of course be sufficient for him to establish that he took it before maturity and for value, since this vests title in him whether the person from whom he received it had title or not.³ It was formerly held that if the latter came to the possession by felony or fraud or other act of bad faith, the burden was on the plaintiff to show that he had used due and reasonable caution in taking it; though gross negligence in the transferee may still be shown as evidence of fraud, though not equivalent to it, yet his title is now held to depend not on the degree of caution which he used, but on his good faith in the transaction.⁴

§ 596. **Special Interest of Plaintiff.** — I have frequently in this work referred to absolute ownership of property and special interest therein. Before going further, it will be well to understand this term special interest when applied to a chattel. Mr. Justice Story explains it thus: "What is meant by a special interest in a thing? Does it mean a qualified right or interest in the thing, a *jus in re*, or a right annexed to the thing? Or does it mean merely a lawful right of custody or possession of the thing, which constitutes a sufficient title to maintain that possession against wrong-doers by action or otherwise? If the latter be its true signification, it is little more than a dispute about terms; as all persons will now admit that every bailee, even under a naked bailment from the owner, and every rightful possessor by act or operation of law, has in this sense a special property in the thing. But this is certainly not the sense in which the phrase is ordinarily understood. When we speak of a person's having a property in a thing, we mean that he has a fixed interest in it (*jus in re*) or some fixed right attached to it, either equitable or

¹ Gregory Point Ry. Co. v. Selleck, 43 Conn. 320; Debow v. Colfax, 10 N. J. L. 151; Gam v. Cordrey, 53 Atl. 334 (Pa.); Spaulding v. Jennings, 173 Mass. 65, 53 N. E. 204.

² 2 Greenl. Ev., 638.

³ *Id.*, 639, citing Bank v. Bank, 10 Cush. 491.

⁴ *Id.*, citing: Story on Bills, 415-416; Story on Promissory Notes, 193-197, 382.

legal; and when we speak of a special property in a thing, we mean some special fixed interest, or right therein, distinct from, and subordinate to, the absolute property, or interest of the general owner.”¹

§ 597. **Same Subject.** — The special interest which plaintiff must show in those cases where he has not the absolute title may be one arising by virtue of his being a mortgagee, lienee, bailee, pledgee or officer holding under an execution or writ of attachment. But under whichever one he may claim, although he may show his special interest, his action will yet fail unless he show further that accompanying such special interest was an actual possession in him or the right to the immediate possession at the time of the conversion. But where plaintiff claims the right of possession under a chattel mortgage vesting the legal title in him, he may maintain trover by proving this fact, although he has not shown that he ever had possession or foreclosed his mortgage.² But it is not enough that the plaintiff show an equitable title, such as the right to redeem, or a reversionary interest subject to the present legal title of another. So, a second mortgagee of personal property, who is not in actual possession, cannot maintain an action in the nature of trover for its conversion, for the reason that the legal title and right of possession is in the holder of the first mortgage, and the defendant would be liable to him alone. To hold otherwise would be to make the defendant liable in two actions of the same kind at the same time and for the same tort in favor of different persons.³

§ 598. **Possession or Right of Possession.** — As has already been said in this work, the action of trover is a possessory action; that is, it is founded upon a disturbance of plaintiff's possession or an interference with his right to the possession of chattels. The question of plaintiff's title in actions of this nature is subordinate to the question of possession or right of immediate possession. Indeed, it is said by Judge Cooley that it is only when the plaintiff is compelled to show his title in order to make out his right to immediate possession that it can be important for him to go further.⁴ However that may be, if some special interest in the property is all that plaintiff can show, the burden is further laid upon him to produce evidence of actual possession.⁵ But the general or absolute owner-

¹ Story on Bailments, §§ 93-g *et seq.*

² Ring v. Neale, 114 Mass. 111; Cook v. Corthell, 11 R. I. 482; Cotton v. Watkins, 6 Wis. 629; Wood v. Weiner, 104 U. S. 786; Collier v. Faulk, 69 Ala. 58; Dunning v. Fitch, 66 Ill. 51; Wright v. Starks, 77 Mich. 221, 43 N. W. 868.

³ Ring v. Neale, 114 Mass. 111, 19 A. R. 316.

⁴ Cooley, Torts, 445, citing Foster v. Chamberlain, 41 Ala. 158.

⁵ Hotchkiss v. McVickar, 12 Johns. 407.

ship draws to it or has attached to it by construction of law the possession or right of possession, so that when it is once shown by the plaintiff that he is absolute owner, he is presumed to have had the possession or right of immediate possession at the time of the conversion.¹ It is the general rule, however, that even though plaintiff has shown himself to be the absolute owner, his right to maintain the action will be defeated if it be shown that there is a right of immediate possession in another. Such was the case where the lessor of chattels was barred from maintaining trover against one who had taken them from the possession of the lessee while the lease still remained in force.² The same may be said in cases of bailment. "In such a case, if the term has not expired or the bailment been terminated at the time the conversion takes place, the owner cannot sue in trover, because not having had the right of possession his only injury is in his reversionary interest, and in suing for that he must count on the special case and not on a conversion."³

§ 599. **Same Subject.** — In the law of trover, the right of property and the possession of it, or the right of immediate possession, may be said to be complements of each other in the sense that if the plaintiff prove his ownership, his possession is presumed therefrom; and further if he show that he had possession, or the right of immediate possession at the time of the conversion, it will be presumed that he had the right of property; and in either case the burden falls upon the defendant to rebut the presumption which thus arises. The rule may otherwise be said to be that proof of either right of property or of possession shows a *prima facie* right in plaintiff to maintain trover, unless it further appears from plaintiff's case that he has temporarily surrendered the possession. And even then in this latter case it is not every instance where plaintiff has surrendered possession that he will be precluded from maintaining the suit. Thus, where a common carrier had possession of chattels under its lien given by the common law for freight charges, it was held that the possession was of such a nature that it did not deprive the general owner of the right to immediate possession as against a wrong-doer, and consequently he could maintain trover.⁴

§ 600. **Same Subject.** — When possession, or right of possession, is relied on at the time of a conversion, the burden of establishing this as a fact is upon the plaintiff, unless general ownership has been

¹ Carter v. Kingman, 103 Mass. 518; White v. Yawkey, 108 Ala. 270, 19 So. 360.

² Wheeler v. Train, 3 Pick. 255; Fairbank v. Phelps, 22 Pick. 535.

³ McGowan v. Chapen, 2 Murph. (N. C.) 61; Marshall v. Davis, 1 Wend. 109; Arthur v. Gayle, 38 Ala. 259.

⁴ Ames v. Palmer, 42 Me. 197, 66 A. D. 271.

shown as hereinbefore disclosed.¹ But when such possession has been established, it is *prima facie* evidence of title sufficient to maintain trover and to cast upon defendant the burden of proving a better title in himself.² And this is true as against every wrong-doer, whatever be the character of the possession. "It is very generally recognized that the possession of chattels, conferring, as it does, title good as against every one but the true owner, will enable the person in possession to maintain trover therefor against a wrong-doer who takes the chattels from his possession and wrongfully converts them, and the wrong-doer cannot set up the title of the true owner in defense of the action or even in mitigation of damages."³ It is not necessary that the possession be actual. There may have been constructive possession at the time of the conversion which will be sufficient as a predicate for the action. This is exemplified in cases where the possession follows the title to land, which is held sufficient in the absence of proof of an adverse possession to support an action for the conversion of chattels taken from the land.⁴ A similar ruling was made where trees,⁵ and grass,⁶ had been severed from land by one who had neither title nor right of possession.

§ 601. **Various Rulings on Burden of Proof.** — Where a corporation sued its cashier for money alleged to have been embezzled by him, it was held that plaintiff had the burden of proving not only that the defendant received the money, but that he also misappropriated it.⁷ But where it is shown that the original taking was tortious, this is presumptive evidence of a conversion, and the burden falls upon the defendant to show that he came by the property honestly and in good faith.⁸ Likewise, where the defendant was a bailee for hire and claimed that the property involved had been stolen from him, the burden was held to be upon him to establish that he had used due and reasonable care of the property.⁹ In an action to recover for a *fi. fa.* which plaintiff alleged had been delivered to the defendant as collateral security, the burden was held to be upon the plaintiff to show that the debt had been paid.¹⁰

¹ *Guernsey v. Fulmer*, 66 Kan. 767, 71 Pac. 578.

² *Derby v. Gallup*, 5 Minn. 119; *Cook v. Patterson*, 35 Ala. 102; *Carter v. Bennett*, 4 Fla. 283; *Montgomery v. Brush*, 121 Ill. 513, 13 N. E. 230; *Harvey v. Lidvall*, 48 Ark. 558.

³ 28 Am. & Eng. Enc. L. 2d ed. 674.

⁴ *White v. Yawkey*, 108 Ala. 270, 19 So. 360.

⁵ *Skinner v. Pinney*, 19 Fla. 42.

⁶ *Stevens v. Gorson*, 87 Me. 564, 33 Atl. 27.

⁷ *Panama Ry. Co. v. Johnson*, 63 Hun 629, 17 N. Y. Supp. 777.

⁸ *Cormier v. Batty*, 41 N. Y. Super. Ct. 70.

⁹ *Brown v. Waterman*, 64 Mass. 117.

¹⁰ *Anderson v. Baker*, 60 Ga. 599.

2. PRESUMPTIONS

§ 602. **Possession Presumes Title.** — As has already been stated, proof of possession of personal property is presumptive evidence of title in him who has the possession.¹ But it was held in an action of trover for a slave, a presumption of title in defendant would not arise from a showing of possession for four years unless such possession was shown to have been adverse.² And in a like action where the defendant failed to give any account of how he obtained possession of a slave, the presumption was held to be that he held from or under the person who was shown to have had the possession for several years prior to the time the defendant acquired it.³ When either title or possession is shown to have existed at the time of the alleged conversion, the law will presume a continuance of this until the contrary is shown by the defendant.⁴ In an action for the conversion of slaves, the presumption was held to be that the slaves belonged to the father instead of his unmarried son who lived with him, and this presumption was strengthened by the fact that the father hired out the slaves and received pay therefor.⁵ Where trover was brought against a sheriff for property which plaintiff claimed to have bought from the attachment debtor, evidence that the debtor received from the plaintiff certain checks a year before was held to raise a presumption of payment and not of a loan.⁶ Where defendant had been intrusted with money to be deposited in a bank, but placed only a part of it on deposit, it was held to be presumed that he converted the remainder to his own use.⁷ And it has been held that a conversion may be inferred from a taking of chattels as well as from a sale of them.⁸ So, where the defendant had received possession from one who had wrongfully taken it, he was presumed, by withholding it from the owner, to have assented to the original wrongful taking and was liable accordingly.⁹ But where it was shown that defendant had possession, such was held not to be presumptive evidence of ownership in the defendant as against the recent and previous possession of the plaintiff.¹⁰ And, on the other hand,

¹ *Derby v. Gallup*, 5 Minn. 119.

² *Willis v. Snelling*, 6 Rich. L. (S. C.) 280.

³ *Barnes v. Mobley*, 21 Ala. 232.

⁴ *Gale v. Gale*, 70 Vt. 540, 41 Atl. 969; *Laubenheimer v. Bach*, 19 Mont. 177, 47 Pac. 803.

⁵ *Reid v. Butt*, 25 Ga. 28.

⁶ *Dyer v. Rosenthal*, 45 Mich. 588, 8 N. W. 560.

⁷ *Spencer v. Morgan*, 5 Ind. 146.

⁸ *Vanderburgh v. Bassett*, 4 Minn. 242; *Stickney v. Smith*, 5 Minn. 486.

⁹ *Anderson v. Kincheloe*, 30 Mo. 520.

¹⁰ *Weston v. Higgins*, 40 Me. 102.

bare possession by the defendant cannot be presumed tortious.¹ Where it was admitted that plaintiff's ancestor held title, this title was presumed to have descended to plaintiff, and the burden was on defendant to show that such title had been divested.² Where the question of the conversion of a promissory note was before the court, it was held competent for the defendant to prove the insolvency of the maker and thereby lessen the damages; but in the absence of any evidence of such fact, the presumption was held to be that the maker was solvent and able to pay.³ The goods involved in an action of trover had been boxed by defendants after sale. The evidence failed to show what became of them; and the court held that it could not be presumed that defendants still had possession almost a year afterward.⁴

3. MANNER OF PROOF

§ 603. **General Principle.** — When the question of title and right of possession of personal property is involved in an action of trover, it is to be determined by the same rules of evidence as apply in other cases where such fact must be established. Thus, circumstances which are the ordinary *indicia* of ownership, or that tend to indicate ownership, are admissible as evidence thereof.⁵ So, the paying of taxes, procuring a policy of insurance describing the property and naming the person to be insured, the giving of a note to secure against losses, and the payment of assessments to meet losses, are all proper tests of ownership — not conclusive, but competent to be submitted to and weighed by the jury.⁶ Positive testimony will not be required if the circumstances shown will support an inference of the truth of the matters alleged.⁷ Thus, where an executor sued a corporation for the conversion of certain bonds alleged to have been deposited with the defendant by plaintiff's testator for safe-keeping, a receipt for such bonds signed by one in his individual name was held admissible when it had been shown that he acted for the defendant in all its dealings and uniformly signed receipts for the corporation in his individual name.⁸ And where the action was between plaintiff and

¹ *Glaze v. McMillan*, 7 Port. (Ala.) 279.

² *Powers v. Hatter*, 152 Ala. 636, 44 So. 859.

³ *Potter v. Merchants Bank*, 28 N. Y. 641, 86 A. D. 273; citing *Walrod v. Ball*, 9 Barb. 271.

⁴ *Whitney v. Slanson*, 30 Barb. 276.

⁵ *Avery v. Chemous*, 18 Conn. 306, 46 A. D. 323.

⁶ *Hodgdon v. Shannon*, 44 N. H. 572; *Carr v. Dodge*, 40 N. H. 403.

⁷ *Vidovich v. Scott*, 134 Cal. xx, 66 Pac. 489; *Freedman v. Campfield*, 92 Mich. 118, 52 N. W. 630.

⁸ *McNamara v. Corp. of New Melleray*, 88 Ia. 502, 55 N. W. 322.

an insolvent debtor, the transcript of an action between the latter's assignee and plaintiff was held admissible as bearing upon the allegations of the complaint.¹ So, where a sheriff was plaintiff in an action of trover, his return on the execution was admitted to show that he had made a levy on the property involved.² It was necessary to prove this in order to show that the sheriff had the necessary possession to enable him to maintain trover. Where the basis of the action was the contention that a writ of attachment had been improperly levied on the goods of plaintiff as belonging to another, the plaintiff was permitted to disprove the alleged indebtedness of the attachment defendant.³ Another strong illustration of the rule permitting the surrounding circumstances to be shown as bearing upon the issues in an action of trover, the plaintiff in one case was allowed to show that defendant, who was charged with the conversion of a horse, was drunk at the time — the admission of this evidence being for the purpose of supporting the contention that he had improperly driven and thereby injured the horse.⁴

§ 604. **Parol or Documentary Evidence.** — The same rules apply in regard to the admission of parol evidence in actions of trover as govern the admission of such evidence in other cases; thus, a party cannot be asked whether he or another owned the property involved, for such calls for a mere conclusion of law.⁵ But the fact of possession, or other facts surrounding the alleged conversion, may be testified to directly by the parties.⁶ Thus, where goods were sold by oral sale which was followed by delivery, the sale may be shown by direct, parol proof, although a bill of sale may have been executed after the delivery of the goods.⁷ Where plaintiff's title, however, depends upon the terms of a written instrument, parol evidence cannot be admitted to control or vary such terms.⁸ This rule was exemplified in a case wherein plaintiff's title depended upon a mortgage and it was held that parol evidence of an agreement as to construction of the mortgage could not be received.⁹ In such cases the writings themselves should be produced.¹⁰

¹ *Demund v. French*, 5 N. J. L. 828.

² *Williams v. Herndon*, 51 Ky. 484, 54 A. D. 551.

³ *Cook v. Hopper*, 23 Mich. 511; *Frame v. Oregon L. Co.*, 48 Ore. 272, 85 Pac. 1009, 86 Pac. 791.

⁴ *Stillwell v. Farwell*, 64 Vt. 286, 24 Atl. 243.

⁵ *Cate v. Fife*, 80 Vt. 404, 68 Atl. 1.

⁶ *Rand v. Freeman*, 1 Allen (Mass.) 517.

⁷ *Adams v. Davis*, 16 Ala. 748; *Sanders v. Stokes*, 30 Ala. 432; *Wood v. Harrington*, 8 Pick. 552.

⁸ *Ripley v. Paige*, 12 Vt. 353.

⁹ *Clark v. Houghton*, 12 Gray 38.

¹⁰ *Bissell v. Pearce*, 28 N. Y. 252.

§ 605. **Acts and Declarations.** — It is the general rule that any act, declaration or admission of a party to an action of trover may be given in evidence if it tend to contradict the allegation of a material fact in his pleading. And in some instances declarations of parties have been admitted as tending to support their allegations, although in other cases such declarations have been held inadmissible on account of their self-serving character. Evidence of plaintiff's conduct inconsistent with his ownership of the property involved is always admissible against him.¹ And it is said that a party's statement as to the nature of his possession is admissible to show how he holds the property, as that it is in subordination to the rights of the owner.² And apparently as an exception to the rule against admitting self-serving declarations, it was held where recovery was sought for the conversion of a note that the holder, who claimed to be the owner, might prove statements made by him at the time of turning the note over to another for collection.³ It has likewise been held that a defendant may introduce his own statements for the purpose of showing his attitude toward the plaintiff and the property involved.⁴ Thus, where the defendant, at the time demand was made upon him for possession of the chattels, made certain statements in form of a reasonable excuse for his refusal to deliver possession, the court said in a subsequent action for the conversion of the property, that such statements were admissible in evidence; although in the particular case they were excluded on account of a violation of a rule of practice that the court was not first advised as to the character of the evidence.⁵ In a case in trover for the conversion of a horse and carriage it was held proper, as tending to prove liability, that the defendant proposed to get a doctor for the horse, offered to get another horse for plaintiff, and to pay for the carriage.⁶ But in another action for the conversion of logs, it was sought to show as a basis of the action that the defendants had converted the logs by claiming to be the owners. It appeared that the plaintiff had sold to the defendants the land upon which were the logs in controversy. The court said: "The only evidence relied upon was, that after the conveyance of the land, some stranger wishing to purchase the logs, applied to defendants for permission to purchase

¹ *Adams v. Kellogg*, 63 Mich. 105, 29 N. W. 679.

² *Nelson v. Iverson*, 17 Ala. 216; *White v. Dinkins*, 19 Ga. 285; *Putnam v. Osgood*, 52 N. H. 148; *Mobley v. Bilberry*, 17 Ala. 428.

³ *Donnell v. Thompson*, 13 Ala. 440.

⁴ *Nat'l Loan Assoc. v. Thompson*, 38 N. Y. App. Div. 445, 56 N. Y. Supp. 401.

⁵ *Dent v. Chiles*, 5 S. & P. 383, 26 A. D. 360.

⁶ *Moore v. Hill*, 62 Vt. 424, 19 Atl. 997.

them from plaintiff. The defendants refused to give any such permission or consent, on the alleged ground that they had already bought the logs from plaintiff. . . . We have no doubt that the mere assertion by the defendants, that the property belonged to them, is not in any sense evidence of a conversion, or from which a conversion can be inferred. If this assertion had been made in plaintiff's presence, and at a time when he claimed to take possession of the logs, and for the purpose of deterring him therefrom, it might merit a different consideration. But made as it was to a stranger, and not in the presence of plaintiff, or within view of the logs, it would be too much to say this is evidence from which the jury could be permitted to infer a conversion of the property by defendants." ¹

§ 606. **Same Subject; Self-serving Declarations.** — But the rule against the admissibility of self-serving declarations has been applied in actions of trover the same as in other cases. Thus, where a purchaser of property brought action against a sheriff for conversion by wrongful attachment thereof as the property of the vendor, the admission, to prove ownership, of evidence of statements by the vendor that he had sold out to the other, being self-serving, was erroneous.² But declarations or admissions against interest are admissible, as where defendant in trover was permitted to prove that plaintiff had admitted title to the property to be in a third person.³ The declarations, however, must be by plaintiff himself or by one duly authorized to make them. In an Oregon case, Cohn, a warehouseman, testified that Lassen delivered to him wool for the account of Penland, which Penland afterwards said belonged to Fields. The witness was then asked to relate any conversation he had with Lassen at the time the wool was delivered, with reference to its coming from Fields' sheep, counsel stating that he expected to prove by the witness that Lassen said it was Fields' share of the wool clipped from the sheep belonging to him which Penland was running on the shares. An objection to the evidence was sustained, which ruling was upheld by the appellate court on the ground that Lassen was only the agent of Penland for the purpose of delivering the wool, and that any statements of his as to ownership were hearsay.⁴ And it was held in a case for the conversion of timber that overtures by defendant's agent with reference to a purchase of the timber were not admissible in the action.⁵

¹ *Irish v. Cloyes*, 8 Vt. 30, 30 A. D. 446.

² *Lunn v. Howells*, 27 Utah 80, 74 Pac. 432.

³ *Glenn v. Garrison*, 17 N. J. L. 1.

⁴ *Goltra v. Penland*, 45 Ore. 254, 77 Pac. 129.

⁵ *C. W. Zimmerman Mfg. Co. v. Dunn*, 151 Ala. 435, 44 So. 533.

§ 607. **Same Subject.** — Where the statute of limitations was urged as a defense in an action of trover, it was held proper to permit plaintiff to prove an acknowledgment of his ownership of the property by the defendant within the term of the statute, not for the purpose of extending the period of limitation, but to show that at the time of the acknowledgment defendant's possession was not adverse to plaintiff and consequently that there was no conversion at that time.¹ While any act or declaration of defendant that admits his liability or disproves his defense may be properly admitted in evidence,² yet in a case of trover for the levy of execution under an invalid judgment, evidence that the property was turned over to the officer by the plaintiff, and at the latter's request was taken in preference to other property, was excluded as immaterial, since it did not tend to show that plaintiff consented to a seizure of his property by the officer.³ But declarations of a third party as to the ownership of the property in controversy have been held admissible to prove title. Thus, it has been said: "Such declarations of the person in possession are not only competent to rebut a title set up by or under the party who made them, but are affirmative evidence of title in the party for whom the person in possession declares that he holds it."⁴

4. ADMISSIBILITY OF EVIDENCE

§ 608. **Motive and Good Faith of Defendant.** — The motive, good faith, or intentions of a defendant in appropriating plaintiff's property are not matters which may be shown in evidence by way of defense. It is not the fact causing the conversion, so much as the effect following it that the courts are interested in. Or, as has been said: "The intention with which the wrongful act is done by which a party is deprived of his property, except when malicious, is of little consequence, provided the act is done. It is the effect of the act which constitutes the conversion."⁵ The question whether a party is to be treated as a wrong-doer and tortious converter depends upon the inquiry whether the asportation of the property was unauthorized and made by him with the intention of appropriating it to his own

¹ *Goodwyn v. Goodwyn*, 16 Ga. 114.

² *Layman v. Slocomb*, 76 Atl. 1094 (Del.); *Lindsay v. Glass*, 119 Ind. 301, 21 N. E. 897; *Cate v. Fife*, 80 Vt. 404, 68 Atl. 1; *Carpenter v. Carpenter*, 154 Mich. 100, 117 N. W. 598.

³ *Marks v. Wright*, 81 Wis. 572, 51 N. W. 882.

⁴ *Bradley v. Spofford*, 23 N. H. 444, 55 A. D. 205.

⁵ *Gibbons v. Farwell*, 63 Mich. 344, 6 A. S. R. 301, citing: *Edwards, Bailments*, 162; *Cooley, Torts*, 534-538-688. See Chap. I, "Intention."

use; and not by the motive by which he was actuated in perpetrating the act. The motive by which a defendant was influenced in converting to his own use the property of another is only material and admissible when it is introduced to repel an attempt by the plaintiff to recover from him exemplary damages.¹ Thus, where the defendant has actually converted the property he cannot show by way of defense that he has benefited the plaintiff by making voluntary payments on the latter's obligations.² So, where plaintiff's property had been wrongfully sold and thereby converted, it was held proper to exclude evidence that the sale had been conducted in a careful manner.³ And it is not proper to admit evidence tending to show that it was not defendant's intention to benefit himself but that the act was solely for the use of another. As was said in one case: "It is no defense in this action, under the circumstances disclosed in this case, that the defendants, in disposing of plaintiff's property, acted without fraud, and in ignorance of plaintiff's rights. It has been held that trover lies against a servant who disposes of goods belonging to another, to his master's use, whether he acts with or without authority from his master in so doing."⁴ Good faith and lack of knowledge of the owner's rights do not lessen the effect of the act, nor prevent its amounting to a conversion.⁵ Yet merely taking a chattel mortgage from one who falsely claims to be the owner has been held not to amount to a conversion.⁶

§ 609. *Same Subject.* — But it has been held that the courts will not apply this rule where it was the duty of the owner to give notice of his rights. Thus, it was said in one case by way of illustration: "If a person standing near and in sight of a bale of goods lying on the side-walk belonging to another, and thus in the legal possession of such other, is able at once to possess himself of it actually, although illegally, and directs a carrier to remove it and deliver it to him at another place, compliance with this order in good faith cannot be treated as a conversion."⁷ And the case would be much stronger should the real owner hear the order given the carrier, and see him taking the goods away, yet remain silent as to his owner-

¹ *Harker v. Dement*, 9 Gill. (Md.) 7, 52 A. D. 670.

² *Frank v. Tatum*, 26 S. W. 900 (Tex. Civ. App.).

³ *Imhoff v. Richards*, 48 Neb. 590, 67 N. W. 483.

⁴ *Everett v. Coffin*, 6 Wend. 603, 100 A. D. 551; *McCormick v. Stevenson*, 13 Neb. 70, 12 N. W. 828; *Herron v. Hughes*, 25 Cal. 555.

⁵ *McDaniel v. Adams*, 87 Tenn. 756, 11 S. W. 939; *Benton v. Beattie*, 63 Vt. 186, 22 Atl. 422; *Lee v. McKay*, 25 N. C. 29; *Loeffel v. Pohlman*, 47 Mo. App. 574; *Wright v. Skinner*, 34 Fla. 453, 16 So. 335.

⁶ *Matteawan Co. v. Bentley*, 13 Barb. 641.

⁷ *Gurley v. Armstead*, 148 Mass. 267, 12 A. S. R. 555.

ship. Where the plaintiff admitted that in the act complained of the defendant acted in good faith, and in such good faith purchased the goods from another, it was held improper to reject evidence that defendant had no knowledge of plaintiff's ownership.¹ And in an action for the conversion of timber, it was held proper, as showing the good faith of defendant, to permit him to introduce evidence to the effect that before cutting the timber he had purchased the land on which it stood from one claiming to have a tax title to it.² In another case, plaintiff sued for the conversion of his horses. Defendant was permitted to show that the horses were trespassing on his pasture and injuring his stock; that he took them up to prevent further injury, and sent word to plaintiff to come and get them, and had no intention of actually impounding them.³

§ 610. **Same Subject.** — Where there was a disputed question of fact as to whether there had been a conversion or an innocent mistake in destroying certain notes, it was held proper to permit to be shown by defendant his offer to execute other notes to replace those destroyed, as going to his good faith in the matter.⁴ But, in general, it may be said that there are two purposes for which evidence of the good faith or good intentions of the defendant may be admissible — one where there is a doubt as to whether a conversion has actually occurred and the motive of defendant may throw some light on the question, and one where the motive may become material in allowing or disallowing a claim for exemplary damages.⁵

§ 611. **Other Similar Acts by Defendant.** — It has been held in some cases that evidence of other similar transactions by the defendant than that complained of may be admissible. Its admissibility is usually placed on the ground of proving intent.⁶ But, on principle, such evidence should ordinarily be inadmissible. To admit the competency of evidence of this character would be analogous to saying that upon an issue as to whether a defendant had paid a promissory note it might be shown that he had or had not paid other notes in no manner connected with the one in issue. In an action to recover treble damages for stolen goods, which theft

¹ *Miller v. Winfree*, 15 S. W. 918 (Tex.).

² *Grant v. Smith*, 26 Mich. 201. See *Hoyt v. Duluth etc. Co.*, 103 Minn. 396, 115 N. W. 263; *Anderson v. Besser*, 131 Mich. 481, 91 N. W. 737.

³ *Walker v. Wetherbee*, 65 N. H. 656, 23 Atl. 621.

⁴ *Brooke v. Lowe*, 122 Ga. 358, 50 S. E. 146. It will be observed, however, that it had not been definitely established that there had been an actual conversion; so that the element of good faith was more important upon this point than as an excuse for a conversion already proved.

⁵ *White v. Yawkey*, 108 Ala. 270, 19 So. 360; *Hotchkiss v. Hunt*, 49 Me. 213.

⁶ *Hall v. Brown*, 30 Conn. 551; *Adams v. Elseffer*, 132 Mich. 100, 92 N. W. 772; *Allison v. Matthiew*, 3 Johns. 235; *Striker v. McMichael*, 1 Phila. 89.

was denied by the defendant, evidence was admitted to show that various other articles not described in the declaration, and which were found with the goods sued for in defendant's possession, had been taken from the store clandestinely.¹ But in opposition to this view, it was held in an action for the conversion of a horse that a witness could not be asked what became of another horse taken at the same time from the same person.² So, it was held proper to exclude evidence to the effect that a principal had in the past seen fit to redeem property wrongfully pledged by his agent, such evidence being offered by a defendant to whom the agent had wrongfully pledged another article.³ And where a barn had burned in which had been stored wheat grown by one of the parties to a contract under which the proceeds of the sale of the wheat were to be shared, it was held improper to admit evidence to the effect that the plaintiff had received the insurance money.⁴ And in trover for the conversion of logs, evidence of attempted conversion of logs belonging to others was held inadmissible to show that defendant was engaged in the business of stealing logs.⁵

§ 612. Indictment or Acquittal of Defendant on Criminal Charge.

— In some states the rule prevails by statute that before one who has feloniously taken chattels can be sued in trover for their conversion, a criminal prosecution must be instituted against him.⁶ In such states, of course the institution of the criminal proceedings is a condition precedent to the action of trover, and evidence of the prior indictment of the thief for larceny is admissible.⁷ As against a purchaser of stolen goods, evidence of the indictment and conviction of the thief is competent.⁸

§ 613. Identity of Chattels Involved. — It would be futile to attempt a statement of any rule governing the admission or rejection of evidence as to the identity of the chattels involved in an action of trover further than to say in a general way that the same rules apply here as in any other character of action where specific property is to be identified. And with this generalization all that remains to be done under this section is to mention a few cases in which the

¹ *Hall v. Brown*, 30 Conn. 551.

² *Steiner v. Trantum*, 98 Ala. 315, 13 So. 365.

³ *Harris Loan Co. v. Book-Type-writer Co.*, 110 Ga. 302, 34 S. E. 1003; *Booth v. Powers*, 56 N. Y. 22; *Steinhart v. Gross*, 63 Hun 638, 18 N. Y. Supp. 489.

⁴ *Baylis v. Cronkite*, 39 Mich. 413.

⁵ *Seymour v. Bruske*, 140 Mich. 244, 103 N. W. 613.

⁶ See: *Rhode Island Gen. Laws*, C. 223, § 16; *McNeal v. Macomber*, 25 R. I. 475, 56 Atl. 683; *Georgia Code*, sec. 2970.

⁷ *Broughton v. Winn*, 60 Ga. 486.

⁸ *Pease v. Smith*, 61 N. Y. 477.

admissibility of evidence of this nature has been involved. In an action for the conversion of ice stored in certain houses, the agent of the railroad was permitted to testify as to the number of cars of ice and the amount in each car shipped by the defendant at the time the conversion was alleged to have occurred.¹ This was clearly permissible, since one pound of ice is worth as much as any other pound ; but if the property had consisted of articles of varying value, the identification would have been insufficient. It has likewise been held that certificates issued by the public inspector of tobacco, stating that a certain person has a specified quantity of tobacco in the public warehouse, is evidence of the possession of the stated quantity of tobacco.² It has been held, however, that where the action was for the conversion of a stock of merchandise by retail sales, it was not necessary to identify the specific articles sold.³

§ 614. **Illustrations of Same Subject.** — Where the property involved in an action of trover was money alleged to have been converted by defendant while managing plaintiff's business, it was held that plaintiff was not compelled to show specific sums converted by defendant, but that the account books of the business were admissible to show the receipts and expenditures.⁴ And where a great number of articles of a printing press were alleged to have been converted, the foreman was allowed to testify as to the articles from a schedule made immediately after they were seized.⁵ Likewise, where goods had been consigned for sale to a commission company, an inventory of the goods in defendant's hands remaining unsold, furnished plaintiff by defendant's business manager shortly before the alleged conversion, was held admissible to prove the amount of goods of plaintiff defendant had on hand at the date of the inventory.⁶ In an action for the conversion, by wrongful sale, of one hundred corporate shares, the defendants offered to prove that at all times they had on hand, above the claims of other customers, enough shares of the same stock in question to meet a demand by plaintiff for his hundred shares. It was held that since all of the shares were of equal value, the evidence should have been received as it proved there was no conversion.⁷

¹ *Gregory v. Rosenkraus*, 78 Wis. 451, 47 N. W. 832.

² *Hance v. McCormick*, Fed. Cas. No. 6,009.

³ *Hall v. Susskind*, 120 Cal. 559, 53 Pac. 46.

⁴ *Bugbee v. Allen*, 56 Conn. 167, 14 Atl. 778.

⁵ *Howard v. McDonough*, 8 Daly 365.

⁶ *Monat v. Wood*, 4 Col. App. 118, 35 Pac. 58; *Case v. Ballou Banking Co.*, 98 Ia. 107, 67 N. W. 98; *Fennessy v. Spofford*, 144 Mass. 22, 10 N. E. 463.

⁷ *Caswell v. Putnam*, 120 N. Y. 153, 24 N. E. 287.

§ 615. **Plaintiff's Title or Right of Possession.** — The necessity that plaintiff should have either title or possession or the right of immediate possession of chattels alleged to have been converted has already been discussed in this volume. In this section will be noted instances in which evidence has been offered to prove these requisites. The same character of evidence which will suffice to establish title or possession of chattels in other actions may prove the same in actions of trover. A plaintiff claimed chattels under a will. It was held that the will was admissible in evidence, not as proving title in the testator but as showing that all the title he had passed to the plaintiff.¹ Where property alleged to have been converted by defendants was in the possession of plaintiff's lessee, it was said that the lease was admissible as an element in the proof of plaintiff's ownership.² Of course, if the plaintiff's direct testimony has a tendency to establish a possession in him at the time of the alleged conversion, the defendant may by cross-examination bring out the character of the possession.³ Where the property involved had been conveyed by deed which, however, was not properly registered, it was held that proof of the delivery of the property was competent aside from any question as to the admissibility of the deed.⁴

§ 616. **Illustrations of Same Subject.** — Where plaintiff's title has been put directly in issue by a denial of his ownership, if the title to him has been obtained through a bill of sale or other written instrument, it is the general rule that such written instrument is the best evidence of his title, and it must be produced or its absence satisfactorily accounted for.⁵ And it has been held that if the plaintiff refuses to produce the written agreement under which he claims title, he cannot introduce oral proof of his title.⁶ The rule is different, however, in Illinois,⁷ Massachusetts,⁸ Minnesota,⁹ Nebraska,¹⁰ New

¹ *Terrell v. McKinney*, 26 Ga. 447.

² *Greiner v. Hild*, 124 Mich. 222, 82 N. W. 1052; *Oliver Ditson Co. v. Bates*, 181 Mass. 455, 63 N. E. 908, 92 A. S. R. 424, 59 L. R. A. 289; *Groveland Imp. Co. v. Farmers S. Co.*, 25 Wash. 344, 65 Pac. 529, 87 A. S. R. 755; where it was held that where a corporation sued for a crop and the defendant put in evidence a lease from plaintiff to him of the land upon which the crop was grown, evidence would be admitted in rebuttal to show that the corporate officers executing the lease were intruders and had no authority to execute it, all of which was known to defendant.

³ *Stearns v. Vincent*, 50 Mich. 209, 45 A. R. 37.

⁴ *Grady v. Sharron*, 14 Tenn. 320.

⁵ *Street v. Nelson*, 67 Ala. 507; *Bray v. Flickinger*, 69 Ia. 167, 28 N. W. 492; *Baldwin v. McKay*, 41 Miss. 363; *Graham v. Hamilton*, 25 N. C. 381.

⁶ *Mullens v. Bullock*, 12 Ky. L. R. 95.

⁷ *Williams v. Jarrot*, 6 Ill. 120.

⁸ *Mason v. Bowles*, 117 Mass. 86.

⁹ *Fay v. Davidson*, 13 Minn. 491.

¹⁰ *Knights v. State*, 58 Neb. 225, 78 N. W. 508.

Mexico,¹ and Pennsylvania,² in which states title to personalty may be shown by oral testimony even though there is a bill of sale or other written evidence of title. Thus, it was said that where sheep are replevied, bills of sale or a certified copy of the recorded brand are competent evidence of ownership; but oral testimony, otherwise competent, may also be admitted to prove title.³ So, title or possessory rights may be shown in any of the following manners: Declaration of party in possession, in derogation of his own title;⁴ the declaration of a former owner in support of his own title when such testimony is offered in favor of one claiming under an execution sale;⁵ declarations of a mortgagor in derogation of his title, if made before the execution of the mortgage, are admissible against the claim of the mortgagee;⁶ but not where the declaration was made after execution of the mortgage;⁷ declarations of an assignor of a chose in action, as against his assignee or privies,⁸ but not self-serving declarations of the assignor;⁹ declarations of an owner of personalty, since deceased, in disparagement of his title, when offered against his personal representatives or next of kin,¹⁰ or legatee;¹¹ that a party executed a mortgage on the property;¹² insured it in his own name;¹³ paid the taxes thereon.¹⁴ Of course it is the rule that where a party is shown to have once had title or possession of personal property, such title or possession is presumed to have continued until the contrary is shown.

§ 617. **Same Subject.** — The foregoing illustrations of proof of title to personal property were not all decided in actions of trover, but the same principles in general apply. Where a sale was shown of a large band of sheep supposed to contain a certain number, it was unexpectedly found at the time and place of delivery that a consider-

¹ *Gale v. Salas*, 11 N. M. 211, 66 Pac. 520.

² *Gallagher v. Lond. Assur. Co.*, 149 Pa. St. 25, 24 Atl. 115.

³ *Gale v. Salas*, *supra*.

⁴ *Nelson v. Iverson*, 24 Ala. 9; *Jones v. Morgan*, 13 Ga. 515; *Criddle v. Criddle*, 21 Mo. 522.

⁵ *Nodle v. Hawthorn*, 107 Ia. 380, 77 N. W. 1062.

⁶ *Tyres v. Kennedy*, 126 Ind. 523, 26 N. E. 394; *Beedy v. Macomber*, 47 Me. 451; see, *contra*: *Merkle v. Beidleman*, 165 N. Y. 21, 58 N. E. 757.

⁷ *Grimes v. Dry Goods Co.*, 164 U. S. 483; *Meyer v. Munro*, 9 Idaho 46, 71 Pac. 969; *Fowler Co. v. McDonnell*, 100 Ia. 536, 69 N. W. 873; *Davis v. Buchanan*, 73 Vt. 67, 50 Atl. 545.

⁸ *Grayson v. Glover*, 33 Ala. 182; *Merrick v. Hulbert*, 15 Ill. App. 606.

⁹ *Heywood v. Reed*, 4 Gray 574.

¹⁰ *Harp v. Harp*, 136 Cal. 421, 69 Pac. 28.

¹¹ *Mueller v. Rebhan*, 94 Ill. 142.

¹² *Downey v. Arnold*, 97 Ill. App. 91.

¹³ *Bettes v. Maygoon*, 85 Mo. 580.

¹⁴ *Little v. Downing*, 37 N. H. 355; see, *contra*: *Larkin v. Baty*, 11 Ala. 303, 18 So. 666.

able number had strayed away, but the remainder were delivered, whereupon the purchaser began a search for the strays, but without success, it was held that there was a sufficient delivery of the missing sheep to consummate a sale as against a judgment creditor of the seller, who, upon finding the strays, levied upon them and sold them under execution. And plaintiff's title was sufficient to maintain trover.¹ A chattel mortgage was admitted in evidence to prove plaintiff's ownership, it appearing that defendant had set out a copy of the mortgage in his answer.² Where the action was for ties left along the railway track under a contract between the plaintiff and the company, it was held that the contract was admissible to show whether by leaving the ties the plaintiff had delivered them to the company.³ And where plaintiff's decedent had pledged bonds to defendant and the latter had been compelled to advance moneys to defend a suit against the corporation, it was held that a refusal of plaintiff to repay such advances was evidence that he had abandoned the bonds to defendant and claimed no title.⁴

§ 618. **Defendant's Title and Right of Possession.** — The right of defendant to the admission of evidence in support of title or right of possession in himself is as broad as that of plaintiff, and is on the other hand similarly subject to the same limitations as to its admissibility and as to its weight and sufficiency.⁵ Thus, where plaintiff, a married woman, brought trover against defendant for the wrongful taking and conversion of a trunk, the defendant offered to prove that plaintiff, with her husband, executed and delivered to him a writing which authorized the holding of the trunk for a debt due to defendant. He also offered the writing in evidence. It was held that the evidence was competent and should have been received.⁶ And where the defendant had bought the goods involved from one who had possession, the latter's claim of ownership was held admissible in support of defendant's claim of title.⁷ So, evidence that the defendant, in his capacity as receiver, was the owner and in possession of the property at the time of the alleged conversion, is

¹ *Kinney v. Bank*, 10 Wyo. 115, 67 Pac. 471, 98 A. S. R. 972.

² *Parlin & Orendorff Co. v. Hanson*, 21 Tex. Civ. App. 401, 53 S. W. 62; *Doyle v. Burns*, 123 Ia. 488, 99 N. W. 195.

³ *Hobart v. Beers*, 26 Kan. 329.

⁴ *Reynolds v. Cridge*, 131 Pa. 189, 18 Atl. 1010. See, in general, under this subject: *Farrow v. Wooley*, 149 Ala. 373, 43 So. 144; *H. C. Jaquith Co. v. Shurmway*, 80 Vt. 556, 69 Atl. 157; *Kirk v. Kane*, 87 Mo. App. 274; *F. A. Thomas Mach. Co. v. Voelker*, 23 R. I. 441, 50 Atl. 838.

⁵ 38 Cyc. 2081-2 and cases cited.

⁶ *Stull v. Howard*, 26 Ind. 456.

⁷ *Land v. Klein*, 29 S. W. 657 (Tex.).

admissible since it tends to disprove the plaintiff's claim of ownership.¹

§ 619. **Same Subject.** — If the plaintiff has sued as the holder of some special interest which gives him the right of possession, defendant cannot prevail in the action by showing title in himself unless he also disproves the special interest or right of possession in the plaintiff. And the same is true where the property is in *custodia legis*. Thus, where the action was by the sheriff for property converted by the defendant after it had been levied on under execution against a third person, the fact that the defendant was the real owner was held to be no defense, and evidence to that effect was excluded.² Defendant may show that he sold the property to one under whom the plaintiff claimed title, and that the sale was conditional on the title passing when payment of the price was made, and that such payment had not been made.³ So, where an officer had levied upon the goods under execution and had left them with the defendant for safe-keeping, the latter refused to deliver them up to the officer, claiming that they were his; it was held in an action against him for conversion that he could show his own right or title but not that of a third person.⁴

§ 620. **Defendant's Title Acquired while Suit Pending.** — Some question has been made as to whether a defendant in trover can set up a title acquired by him since the commencement of the action in bar of plaintiff's right to recover. It has been held that he cannot.⁵ But the contrary has also been held.⁶ The case last cited was trover by a mortgagor for the value of property mortgaged, and the defendant was permitted to show by way of defense that after the commencement of the action he purchased the mortgage and held the legal title to the property by virtue of a right of possession after a default in payment as provided in the mortgage. The decision is based upon the principle that an answer from which it appears that plaintiff's cause of action has been extinguished after the commencement of the action states a good defense.⁷ Perhaps the most the defendant could be held for, on principle, would be nominal damages. It has been held that if defendant show a lawful possession in himself subsequent to that of the plaintiff, this will defeat plaintiff's action

¹ *Kirk v. Kane*, 87 Mo. App. 274.

² *Weidensaul v. Reynolds*, 49 Pa. St. 73.

³ *Fifield v. Elmer*, 25 Mich. 48.

⁴ *Hampton v. Swisher*, 4 N. J. L. 66.

⁵ *Clapp v. Glidden*, 39 Me. 448.

⁶ *Hurt v. Hubbard*, 41 Col. 505, 92 Pac. 908.

⁷ Citing: *Drought v. Curtis*, 8 How. Pr. 56; *Bolander v. Gentry*, 36 Cal. 105, 95 A. D. 162.

unless he can show title in himself.¹ But title once having been established by plaintiff, the subsequent possession of the defendant has been held insufficient, and the latter must show title in himself.²

§ 621. **Title and Right of Possession of Third Persons.** — The Elliotts, in their work on Evidence, say:³ "There is some conflict among the authorities as to whether title in a third person may be shown as a defense in an action of trover, especially under the general denial. And in the same text book we sometimes find a statement in one place that it may be shown and in another place that it may not be.⁴ There are many authorities which state in general terms that the wrong-doer cannot show title of a third person under whom he does not claim, as a defense,⁵ and there are others in which it is held that he may do so.⁶ Where the plaintiff was out of possession at the time of the alleged conversion there is good reason for holding, as most of the authorities do hold, that the defendant may set up title in a third person as a defense,⁷ and this may distinguish some of the authorities, but, in some of the cases cited in the note referring to decisions holding that such a defense might be set up the possession seems to have been taken from the plaintiff himself and it was held that as the defendant might be compelled to pay the true owner the value of the property, and the satisfaction of the judgment in the action in question would not vest a good title in the defendant, he ought to be allowed to set up title of the true owner."

§ 622. **Same Subject.** — It will thus be seen that courts differ widely upon this question. It seems that there are three lines of authorities, each based upon its own reasoning. What I will call the first set of decisions, maintain that when a defendant is sued in trover he cannot show that title to the property is in a third person.⁸ Thus where an officer attached property of one person under a writ against another, it was held in an action of trover against the officer

¹ *Smoot v. Cook*, 3 W. Va. 172.

² *Weston v. Higgins*, 40 Me. 102.

³ § 2668.

⁴ See, for instance, 7 *Lawson, Rights & Rem.* §§ 3364-3365.

⁵ Citing, *id. al.* *Duncan v. Sprar*, 11 Wend. 54; *Carter v. Bennett*, 4 Fla. 283; *Cook v. Patterson*, 35 Fla. 102; *Montgomery v. Brush*, 121 Ill. 513, 13 N. E. 230; *Kane v. Hutchinson*, 93 Mich. 488, 53 N. W. 624; *Gauche v. Milbrath*, 94 Wis. 674, 69 N. W. 999; *Miller v. Waite*, 60 Neb. 431, 83 N. W. 355.

⁶ Citing: *Boyce v. Williams*, 84 N. C. 275, 37 A. R. 618; *Swope v. Paul*, 4 Ind. App. 463; *Simar v. Shea*, 85 N. Y. S. 457; *Clapp v. Glidden*, 39 Me. 448; *Benner v. Feige*, 51 Mich. 569, 17 N. W. 60.

⁷ Citing: *Morey v. Hoyt*, 65 Conn. 516, 33 Atl. 496; *Krewson v. Purdon*, 13 Ore. 563, 11 Pac. 281; *Penn. Ry. Co. v. Hughes*, 39 Pa. St. 521; *Legrand v. Swayze*, 4 N. J. L. 326; *Robinson v. Peru Plow Co.*, 1 Okla. 140, 31 Pac. 989.

⁸ *Gaines v. Briggs*, 9 Ark. 46; *Carpenter v. Carpenter*, 154 Mich. 100, 117 N. W. 598; *Harris v. Smith*, 71 N. H. 330, 52 Atl. 854; *Salliday v. Johnson*, 38 Pa. St. 380; *Penn. Plow Co. v. Harker*, 144 Fed. 673, 75 C. C. A. 475; *R. C. Stuart Drug Co. v. Hirsch*, 50 S. W. 583 (Tex.); *Gauche v. Milbrath*, 94 Wis. 674, 69 N. W. 999.

by the owner that the former could not show that when attached the property was in the possession of a carrier who had a lien on same for freight.¹ And it was held to be no defense that the property had been taken from the defendant under process in favor of a third person, unless the original owner had received it.² And the defendant cannot set up or take advantage of the lien of a third person in order to defeat plaintiff's recovery.³ In another case it was said that the defendant could not object that plaintiff had sold part of the property to a third person.⁴

§ 623. **Same Subject.** — Another set of cases support the theory that a defendant sued in trover may always show by his evidence and by way of defense that title to the property is not in plaintiff, but rests in some third person — and this regardless of any condition.⁵ There is much to commend this doctrine, in view of the rule hereinbefore discussed that in an action in trover the plaintiff must recover upon the strength of his own title and not upon the weakness of that of his adversary. The doctrine has been put upon the ground that if the defendant could not show the title of a third person he might be compelled to pay for the same property to such third person who was a stranger to the first suit.⁶ And the North Carolina court has said: "But if it appears on the trial that the plaintiff, although in possession, is not in fact the owner, the presumption of title inferred from the possession is rebutted, and it would be manifestly wrong to allow the plaintiff to recover the value of the property. For the real owner may forthwith bring trover against the defendant and force him to pay the value a second time, and the fact that he had paid it in a former suit would be no defense. . . . Trover can never be maintained unless a satisfaction of the judgment will have the effect of vesting a good title in the defendant, except where the property is restored and the conversion was temporary." ⁷

§ 624. **Same Subject.** — The third line of authorities, with perhaps better reasoning, and certainly with numerical preponderance, hold that a defendant in trover will be permitted to show title in a

¹ *Stearns v. Dean*, 129 Mass. 139.

² *Watson v. Coburn*, 35 Neb. 492, 53 N. W. 477.

³ *Jones v. Sinclair*, 2 N. H. 319, 9 A. D. 75.

⁴ *Moore v. Aldrich*, 25 Tex. Supp. 276.

⁵ *Glenn v. Garrison*, 17 N. J. L. 1; *Rotan v. Fletcher*, 15 Johns. (N. Y.) 207; *Schryer v. Fenton*, 15 N. Y. App. Div. 158, 44 N. Y. Supp. 203; *Laird v. Coach*, 112 Mich. 628, 71 N. W. 160; *Seymour v. Peters*, 67 Mich. 415, 35 N. W. 62; *Morey v. Hoyt*, 65 Conn. 516, 33 Atl. 496; *Barwick v. Wood*, 48 N. C. 306.

⁶ *Clapp v. Glidden*, 39 Me. 448.

⁷ *Barwick v. Barwick*, 11 Ired. 80, cited and followed in *Boyce v. Williams*, 84 N. C. 275, 37 A. R. 619. See: *Eiseman v. Maul*, 8 Fed. Cas. No. 4322; *Ribble v. Lawrence*, 51 Mich. 569, 17 N. W. 60.

third person if he can in any way connect himself with it, but otherwise such fact cannot be shown.¹ One court has said: "It is true, there are cases where it is stated generally that in trover a defendant may show title in a third person. But that should be understood as assuming that the defendant offers at the same time to connect himself with such title."² If the defendant would protect himself by showing an outstanding title in another, he must connect himself with it by showing that he acted under the authority of him who was in fact the owner.³ And he cannot show title in a third person with whom he has no privity, either to defeat the action or in mitigation of damages.⁴

§ 625. **Whether Proof of Tortious Act Necessary.** — It has been shown at various places in these pages that a conversion is an appropriation of property to one's own use, either actual or constructive, and that any wrong which does not amount to such appropriation is not a conversion, and while it may entitle the injured person to some remedy, it will not support an action of trover. It thus becomes apparent that in order to establish a conversion, the plaintiff's evidence must show a positive tortious act on the part of the defendant.⁵ Thus, if chattels which were in the possession of one other than their owner are lost or stolen through the want of reasonable care on the part of their custodian, or injured by accident, or through his mere negligence or non-feasance, not accompanied by any misappropriation on his part, the evidence of such facts would be insufficient to support trover against defendant as for a conversion.⁶ Neither is a conversion shown by evidence of a failure to perform a duty made obligatory by contract, even though the property is lost to the owner; and on like principle, bare possession of property without some wrongful act in its acquisition, or in its detention, and without any illegal assumption of ownership, or illegal user or misuser, is not a conversion for which trover will lie.⁷

¹ *George v. Pierce*, 123 Cal. 172, 55 Pac. 775, 56 Pac. 53; *Skinner v. Pinney*, 19 Fla. 42, 45 A. R. 1; *Ward v. Carson Riv. Wood. Co.*, 13 Nev. 44; *O'Brien v. Hilburn*, 22 Tex. 616; *Reynolds v. Fitzpatrick*, 28 Mont. 170, 72 Pac. 510, 23 Mont. 52, 57 Pac. 452; *Harker v. Dement*, 9 Gill (Md.) 7, 52 A. D. 670; *Huffman v. Parsons*, 21 Kan. 467; *Brown v. Shaw*, 51 Minn. 266, 53 N. W. 633; *Pruitt v. Sunn*, 151 Ala. 651, 44 So. 659; *Mitchell v. Thomas*, 114 Ala. 459, 21 So. 991; *Wheeler v. Lawson*, 103 N. Y. 40, 8 N. E. 360; *Stevens v. Gordon*, 87 Me. 564, 33 Atl. 27.

² *Weymouth v. Chicago, etc. Ry.*, 17 Wis. 550, 84 A. D. 763; *Steele v. Schricker*, 55 Wis. 134.

³ *Lowremore v. Berry*, 19 Ala. 130, 54 A. D. 188.

⁴ *Harker v. Dement*, *supra*; *Duncan v. Spear*, 11 Wend. 54; *Marcy v. Parker*, 78 Vt. 73, 62 Atl. 19.

⁵ *Parker v. Middlebrook*, 24 Conn. 27; *Conner v. Allen*, 33 Ala. 515; *Lewis v. Metcalf*, 53 Kan. 217, 36 Pac. 345; *Fitch v. Beach*, 15 Wend. 221.

⁶ *Packard v. Getman*, 4 Wend. 613, 21 A. D. 166.

⁷ *Bolling v. Kirby*, 90 Ala. 215, 7 So. 914, 24 A. S. R. 789; *Farrer v. Rollins*, 37 Vt. 295; *Sturges v. Keith*, 57 Ill. 451; *Dearbourn v. Bank*, 58 Me. 273.

§ 626. **Illustrations of Same Subject.** — Where the cattle of plaintiff and defendant ran together in the same inclosure, evidence that by mistake the defendant marked some of plaintiff's cattle with his brand was insufficient to show a conversion.¹ But somewhat contrary to this, it was held that where logs bearing the plaintiff's mark were mingled with those of the defendant in the latter's private mill boom, and were sawed by defendant into lumber with his own, this was sufficient to amount to a conversion.² And proof that plaintiff's cow was put by defendant in his lot with other cattle which he was collecting for shipment, was held sufficient as a *prima facie* showing of conversion.³ The Wisconsin court held in one case that proof that property was one day in the possession of plaintiff, and two days afterward was in the unexplained possession of defendant in his yard was sufficient to sustain trover as for a conversion.⁴ Yet here was no proof of a tortious act. If plaintiff had permission to remove the property from defendant's possession, evidence that defendant refused to take it back to plaintiff has been held insufficient to show a conversion.⁵ And even where the facts proved show a conversion, evidence of plaintiff's ratification of the act will defeat a recovery.⁶ In general, it may be said that the proof will be insufficient unless it show that plaintiff's ownership has been denied or that he has been deprived of his property.⁷

§ 627. **Property Restored by Defendant.** — A return of the property in controversy cannot be shown for the purpose of defeating the plaintiff's cause of action; that fact can be shown only for the purpose of mitigating damages.⁸ The following pertinent statement occurs in Judge Freeman's note in 24 A. S. R. page 811: "While so far as we are aware the right of a defendant who has been guilty of the conversion of chattels to restore them to their owner has not been tested in any of the American courts by any direct proceeding,

¹ *Sawyer v. Kenan*, 95 Ga. 552, 22 S. E. 324.

² *Clark v. Lumber Co.*, 34 Minn. 289, 25 N. W. 628.

³ *Ireland v. Horseman*, 65 Mo. 511.

⁴ *Thomas v. Steele*, 22 Wis. 207.

⁵ *Brown v. Boyce*, 68 Ill. 294; *Hewett v. Sessions*, 119 Mass. 221.

⁶ *Reynolds Banking Co. v. Neisler*, 130 Ga. 789, 61 S. E. 828.

⁷ *Louisville Co. v. Scheinert*, 156 Ala. 411, 47 So. 293; *Martin v. Barry*, 145 Cal. 540, 79 Pac. 66; *Beaton v. Wade*, 14 Col. 4, 22 Pac. 1093; *Pound v. Pound*, 64 Minn. 428, 67 N. W. 200; *Southwestern Co. v. Cobble*, 124 Mo. App. 647, 102 S. W. 9; *Cather v. Damerell*, 97 N. W. 623 (Neb.); *Race v. Moore*, 34 Misc. 170, 68 N. Y. Supp. 792; *Willis v. Holmes*, 28 Ore. 583, 42 Pac. 988; *Miss. Mills v. Banman*, 12 Tex. Civ. App. 312, 34 S. W. 681; *Litell v. Pettit*, 26 Ky. L. R. 323, 81 S. W. 237.

⁸ 13 Enc. Evidence, 89, citing: *Western Land Co. v. Hall*, 33 Fed. 236; *Norman v. Rogers*, 29 Ark. 365; *Murphy v. Hobbs*, 8 Col. 17, 5 Pac. 637; *Whittingham v. Owen*, 19 D. C. 277; *Bodega v. Perkerson*, 60 Ga. 516; *Smith v. Downs*, 6 Ind. 374; *Coburn v. Watson*, 48 Neb. 257, 67 N. W. 171; *Arnold v. Kelley*, 4 W. Va. 642.

by motion or otherwise, except in the cases already cited, the emphatic language of the other decisions in which this right has been considered, either directly or incidentally, is such as to convince us that the weight of authority in this country supports the rule that when a cause of action has once accrued to the owner of chattels on account of their conversion by another, the latter can neither destroy it, nor restore the property in mitigation of damages without the assent of the former."¹

§ 628. **Same Subject.** — The same authority says in reference to the acceptance of the restoration: "If property which has been converted is returned to its owner, who accepts it, this does not destroy the cause of action which arose on the conversion. The injured party is still entitled to maintain an action for the injury, but the return must be considered in mitigation of damages. In other words, the plaintiff's recovery must be limited to nominal damages, and such special damages as he is shown to have suffered from the conversion before the restoration of the property was accepted."²

§ 629. **Variance from Pleading.** — A recovery in trover must be *secundum allegata et probata*, and proof of a different cause of action,³ of an act which does not constitute a conversion,⁴ of a right of detention different from the one pleaded,⁵ or a conversion other than the one alleged,⁶ or of the conversion of a thing different from the one described,⁷ is a fatal variance.⁸ It is also a fatal variance if the evidence shows that plaintiff, who has pleaded general ownership, is a nominal, joint or equitable owner.⁹ On the other hand, where

¹ Citing: *Higgins v. Whitney*, 24 Wend. 379; *Wooley v. Carter*, 7 N. J. L. 85, 11 A. D. 520; *Livermore v. Northrup*, 44 N. Y. 107; *Walker v. Fuller*, 29 Ark. 448; *Stickney v. Allen*, 10 Gray 352.

² Citing: *Kelly v. McDonald*, 39 Ark. 387; *Whitaker v. Houghton*, 86 Pa. St. 48; *Brewster v. Silliman*, 38 N. Y. 423; *Barrelett v. Bellgard*, 71 Ill. 280; *Cook v. Loomis*, 26 Conn. 483; see: *Marshall, etc. Co. v. Kan. City Ry. Co.*, 176 Mo. 480, 75 S. W. 638, 98 A. S. R. 508; *Munier v. Zachary*, 138 Ia. 219, 114 N. W. 525, 18 L. R. A. (N. S.) 572; *Carpenter v. Am. B. Assoc.*, 54 Minn. 403, 40 A. S. R. 345; *Coburn v. Watson*, 48 Neb. 257, 67 N. W. 171; *Baltimore, etc. Ry. Co. v. O'Donnell*, 49 Ohio St. 489, 32 N. E. 476, 34 A. S. R. 579, 21 L. R. A. 117; *Waller v. Bowling*, 108 N. C. 289, 12 S. E. 990, 12 L. R. A. 261; *Pinckney v. Darling*, 158 N. Y. 728, 53 N. E. 1130.

³ *Woods Mach. Co. v. Woodcock*, 43 Wash. 317, 86 Pac. 570; *Huntington v. Herrman*, 188 N. Y. 622, 81 N. E. 1166.

⁴ *Duncan v. Fisher*, 18 Mo. 403; *Middle Div. El. Co. v. Hawthorne*, 89 Ill. App. 596.

⁵ *Hubbard Bank v. Cleland*, 36 Tex. Civ. App. 478, 82 S. W. 337.

⁶ *Payne v. Elliott*, 54 Cal. 339, 35 A. R. 80; *Priest v. Way*, 87 Mo. 16; *Cooper v. Blair*, 14 Ore. 255, 12 Pac. 370; *Lewis v. Hatton*, 86 Tex. 533; 26 S. W. 50.

⁷ *Hereford v. Pusch*, 8 Ari. 76, 68 Pac. 547; *Harper v. Scott*, 63 Ill. App. 401; *Bixel v. Bixel*, 107 Ind. 534, 8 N. E. 614; *Ensworth v. Barton*, 60 Mo. 511; *Worth v. Buck*, 34 Neb. 703, 52 N. W. 566; *Ward v. Smith*, 30 N. C. 296; *Smith v. Donahue*, 13 S. D. 334, 83 N. W. 264.

⁸ Above citations are from 38 Cyc. 2076-7.

⁹ *Gates v. Thede*, 91 Ill. App. 603; *Johnson v. Bank*, 102 Mo. App. 395, 76 N. W. 699; *Gooch v. Isbell*, 77 S. W. 973.

several join as plaintiffs, it has been held a variance to prove title or right of possession in one of them alone.¹ Plaintiff cannot sue for the conversion of property and recover for the conversion of the proceeds of the sale of property.² But general averments of ownership and right of possession authorize the plaintiff to introduce any evidence whatever to show how he became the owner and entitled to possession, and he is not restricted to proof of any particular origin of ownership or right of possession.³

¹ *Pettibone v. Phelps*, 13 Conn. 445, 35 A. D. 88.

² *Gilbert v. Walker*, 64 Conn. 390; *Bixel v. Bixel*, 107 Ind. 534.

³ 21 Enc. Pl. & Pr. 1115, and cases cited. For cases of immaterial variances, see 38 Cyc. 2077, note 71.

CHAPTER XII

MEASURE OF DAMAGES

1. GENERAL PRINCIPLES

- § 630. Value of property, with interest.
- § 631. Same subject; illustrations.
- § 632. Same subject; property never in existence.
- § 633. Same subject.

2. WHERE PLAINTIFF OWNER OF SPECIAL INTEREST

- § 634. Recovery limited to value of special interest.
- § 635. Same subject.
- § 636. Illustrations of special interests.
- § 637. Action between co-tenants.

3. RECOUPMENT WHERE DEFENDANT OWNER OF SPECIAL INTEREST

- § 638. Recoupment goes in mitigation.
- § 639. When recoupment allowed.
- § 640. Same subject.
- § 641. Same subject; deducting amount due defendant.

4. VALUE

- § 642. Market value.
- § 643. How market value determined.
- § 644. Whether wholesale or retail value taken.
- § 645. Place of fixing value.
- § 646. Market value at place of conversion.
- § 647. Market value of goods in transit.
- § 648. Time of fixing value.

- § 649. Time of conversion usually governs.

- § 650. Exceptions to general rule.
- § 651. Property of fluctuating value.

- § 652. Same subject; holding of New York courts.

- § 653. Same subject.

- § 654. Same subject.

- § 655. Same subject.

- § 656. Same subject; what is reasonable time after conversion.

- § 657. Same subject; rule in other states.

- § 658. Views of Sedgwick as to rule where value fluctuates.

- § 659. Property without market value.

- § 660. Same subject; damages measured by actual value.

5. VALUE ENHANCED BY WRONG-DOER

- § 661. General principles.

- § 662. Recovery of enhanced value.

- § 663. Same subject.

- § 664. Recovery of value at time of conversion less cost of improvements.

- § 665. Same subject.

- § 666. Recovery affected by mistake or bad faith of defendant.

- § 667. Same subject; conversion of coal or ore.

- § 668. Same subject; conversion of timber.

- § 669. Same subject.

- § 670. Same subject; where wrong willful.

- § 671. Actions against purchaser from wrong-doer.
 § 672. Value of use of converted property.

6. INTEREST

- § 673. Why interest allowed from time of conversion.
 § 674. From what time interest computed.

7. RE-PURCHASE BY OWNER AFTER CONVERSION

- § 675. Damage is usually amount paid.
 § 676. Same subject.
 § 677. Re-purchase equivalent to return.

8. AMOUNT RECEIVED FROM SALE BY DEFENDANT

- § 678. Generally no criterion of damages.

9. CONFUSION OF GOODS

- § 679. Effect of good faith on measure of recovery.
 § 680. Where gas or oil intermingled.

10. FOR CONVERSION OF MORTGAGED CHATTELS

- § 681. In favor of mortgagee.
 § 682. In favor of mortgagor.

11. WHERE PLEDGED PROPERTY CONVERTED

- § 683. Damages in favor of pledgor.
 § 684. Damages in favor of pledgee.
 § 685. Collateral security.

12. UNDER CONDITIONAL SALES

- § 686. Where purchase price partly paid.

13. CORPORATE SHARES

- § 687. Where corporation refuses to transfer stock or otherwise converts it.
 § 688. Where conversion is by an individual.

14. DAMAGES AGAINST CARRIERS

- § 689. For loss or non-delivery of goods.
 § 690. Wrongful delivery by carrier.
 § 691. Damages for deviation from instructions.
 § 692. Miscellaneous property.

15. SPECIAL DAMAGES

- § 693. General rule as to special damages.
 § 694. Where property wrongfully seized under attachment or execution.
 § 695. Same subject.
 § 696. Expenses of following or recovering chattels.
 § 697. Punitive damages.

16. MITIGATION OR REDUCTION OF DAMAGES

- § 698. General principles of mitigation.
 § 699. What may be shown to reduce damages.
 § 700. Same subject; return and acceptance of property.

1. GENERAL PRINCIPLES

§ 630. **Value of Property with Interest.** — The general rule fixing the measure of damages to be recovered against a wrong-doer who has converted personal property has been declared so many times that it is but the repetition of an almost stereotyped expression to say that the measure of recovery is the value of the property at the time of the conversion, with interest.¹ This presupposes, of course,

¹ *Dows v. Bank*, 91 U. S. 618, 23 L. Ed. 214; *Gray v. Cocheron*, 8 Post. (Ala.) 191; *Massey v. Fain*, 55 So. 936 (Ala.); *Am. Soda F. Co. v. Futrall*, 73 Ark. 464, 84

that the property converted had a market value, and the rule is based on the theory of compensation, that is, that the value recovered is equivalent, as far as benefit to the owner is concerned, to the property, the interest being added either to make up for the value of the use of the property or the value of the use of its money-worth between the date of conversion and that of trial.¹ The general rule has been well stated thus: "Since in an action of trover for the conversion of personal property the purpose is, not to secure a return of the property, but to secure a money indemnity to the plaintiff for the property converted, the general rule is that the inquiry as to what sum of money will so indemnify him should be directed to the value of the property at the time of the conversion with legal interest from such time to the entry of judgment,² unless the case is a proper one for exemplary damages, and subject of course to the rule permitting

S. W. 505, 108 A. S. R. 64; *Fordyce v. Denpsey*, 72 Ark. 471, 82 S. W. 493; *Cent. Coal Co. v. Shoe Co.*, 69 Ark. 302, 63 S. W. 49; *Ryburn v. Pryor*, 14 Ark. 505; *Jefferson v. Hale*, 31 Ark. 286; *Hand v. Scodeletti*, 128 Cal. 674, 61 Pac. 373; *Lynch v. McGhan*, 7 Cal. App. 132, 93 Pac. 1044; *Cassin v. Marshall*, 18 Cal. 689; *Barrante v. Garrat*, 50 Cal. 112; *Sylvester v. Craig*, 18 Col. 44, 31 Pac. 387; *Harmon v. Connett*, 10 Col. App. 171, 50 Pac. 214; *Sutton v. Dana*, 15 Col. 98, 25 Pac. 90; *Vaughan v. Webster*, 5 Harr. 256; *Layman v. Slocomb & Co.*, 76 Atl. 1094 (Del.); *Foster v. Brooks*, 6 Ga. 287; *Hilton v. Ry. Co.*, 67 S. E. 746 (Ga. App.); *Riley v. Martin*, 35 Ga. 136; *Skinner v. Pinney*, 19 Fla. 42, 45 A. R. 1; *Tripp v. Grouner*, 60 Ill. 474; *Schwitters v. Springer*, 236 Ill. 271, 86 N. E. 102; *Head v. Becklenberg*, 116 Ill. App. 576; *Moreley v. Roach*, 116 Ill. App. 534; *Yater v. Mullen*, 24 Ind. 277; *Robinson v. Hurley*, 11 Ia. 410, 79 A. D. 497; *Russell v. Huiskamp*, 77 Ia. 727, 42 N. W. 525; *Winstead v. Hicks*, 135 Ky. 154, 121 S. W. 1018, 135 A. S. R. 446; *Sanders v. Vance*, 7 T. B. Mon. 209, 18 A. D. 167; *Rogers v. Troyman*, 56 S. W. 665, 22 Ky. L. R. 40; *Jenning, etc. v. Oil Co.*, 127 La. 971, 54 So. 318; *Wing v. Milliken*, 91 Me. 387, 40 Atl. 138, 64 A. S. R. 238; *Robinson v. Barrows*, 48 Me. 186; *Hopper v. Haines*, 71 Md. 64, 18 Atl. 29, 20 Atl. 159; *Walker v. Schindel*, 58 Md. 360; *Beecher v. Denniston*, 13 Gray 354; *Hunt v. Boston*, 183 Mass. 303, 67 N. E. 244; *Allen v. Kinyon*, 41 Mich. 281, 1 N. W. 863; *Saltmarsh v. Chicago, etc. Co.*, 122 Mich. 103, 80 N. W. 981; *Murphy v. Sherman*, 25 Minn. 196; *Ill. Cent. Ry. v. Le Blanc*, 74 Miss. 626, 21 So. 748; *Spencer v. Vance*, 57 Mo. 427; *Baker v. Kans. City Etc. Ry. Co.*, 52 Mo. App. 602; *Newman v. Kane*, 9 Nev. 234; *Russell v. McCall*, 141 N. Y. 437, 36 N. E. 498, 38 A. S. R. 807; *Griswold v. Haven*, 25 N. Y. 595, 82 A. D. 380; *Hendricks v. Decker*, 35 Barb. 298; *Cutler v. James Gould Co.*, 43 Hun 516; *Wehle v. Haviland*, 69 N. Y. 448; *Dixon v. Caldwell*, 15 Ohio St. 412, 86 A. D. 487; *Baltimore, etc. Ry. Co. v. O'Donnell*, 49 Ohio St. 489, 32 N. E. 476, 34 A. S. R. 579, 21 L. R. A. 117; *Oklahoma v. Lumber Co.*, 3 Okla. 5, 39 Pac. 386; *Lee Tung v. Burkhart*, 116 Pac. 1066 (Ore.); *Goltra v. Penland*, 42 Ore. 18, 69 Pac. 925; *Perrin v. Wells*, 155 Pa. 299, 26 Atl. 543; *Traynor v. Johnson*, 3 Head. (Tenn.) 44; *Scott v. Childers*, 24 Tex. Civ. App. 349, 60 S. W. 775; *Hatcher v. Pelham*, 31 Tex. 201; *Thrall v. Lathrop*, 30 Vt. 307, 73 A. D. 306; *Delano v. Blanchard*, 52 Vt. 578; *Ingram v. Rankin*, 47 Wis. 406, 2 N. W. 755, 32 A. R. 762; *Cecil v. Clark*, 49 W. Va. 459, 39 S. E. 202; *Mann v. Land Co.*, 24 Fed. 261.

¹ *Simpson v. Alexander*, 35 Kan. 225, 11 Pac. 171; *Ewing v. Blount*, 20 Ala. 694.

² 13 Enc. Ev. 94, citing, *id al.*, *Brooks v. Rogers*, 101 Ala. 111, 13 So. 386; *Kelly v. McDonald*, 39 Ark. 387; *Beaman v. Stewart*, 19 Col. App. 222, 74 Pac. 342; *Cook v. Loomis*, 26 Conn. 483; *Wright v. Skinner*, 34 Fla. 453, 16 So. 335; *Mo. Pac. Ry. v. Peru, etc. Co.*, 73 Kan. 295, 85 Pac. 408, 87 Pac. 80; *Davidson v. Kolb*, 95 Mich. 469, 55 N. W. 373; *Waller v. Bowling*, 108 N. C. 289, 12 S. E. 990; *Hill v. Canfield*, 56 Pa. St. 454.

proof of matters in mitigation of damages." And the rule has also been expressed in this way: "The measure of damages is compensation for the injury sustained. An amount which will place the injured party in the same position he would have occupied if no loss had occurred, will satisfy this requirement."¹ Again: "The usual rule of damages in actions of trover is compensation to the owner for the loss of his property occasioned by its conversion; and where the conversion is complete, and results in an entire appropriation of the property by the wrong-doer, the loss is generally measured by the value of the property converted, with interest to the time of trial."² In a Michigan case of trover, Judge Cooley in delivering the opinion of the court said: "We do not feel called upon in this case to say that there is any inflexible rule applicable to all cases of wrongful conversion, we think that where there are no special circumstances which require a different measure of damages to be applied it is proper to award to the plaintiff the value of the property at the time of conversion, with interest from that time; in other words, to award to him a sum of money which at the time he was wrongfully deprived of his property would enable him to procure an equal amount of the same value."³

§ 631. **Same Subject; Illustrations.** — In one case from Washington, the plaintiff was the owner of certain tools which he kept in a tool-box. Defendant corporation broke open the box and removed the tools, and its officer, on being asked for them, replied that the company needed the tools and would rather pay for them than return them; and relying on such promise the owner did not again demand the tools, but when they were worn out, sued for their conversion. In sustaining his contention, the court, upon the question of the measure of damages, said: "The measure of damages was the value of the goods at the time of conversion, and the conversion was at the time the goods were taken. That a demand was afterwards made, and a promise to pay, did not change the character of the action. If an amount had been agreed upon, and a promise to pay the amount, the plaintiff, in that event, might have waived the tort and sued for the amount agreed upon. But in this case no such agreement had been made, and the action was not of that kind. Defendant had simply promised that payment would be made without agreeing to the amount. The fact that plaintiff relied upon this

¹ *Mo. Pac. R. v. Peru, etc. Co., supra.*

² *Beede v. Lamprey*, 64 N. H. 510, 15 Atl. 133, 10 A. S. R. 426; citing *Gove v. Watson*, 61 N. H. 136.

³ *Ripley v. Davis*, 15 Mich. 75, 90 A. D. 262; and cases cited.

promise, and therefore did not make another demand or bring his action until the tools were worn out and of little or no value should be no reason why he could not recover the value of the tools at the time they were taken by the defendant.”¹ It was said by the Minnesota court: “Two rules upon the subject of the measure of damages in actions for the conversion of personal property are recognized and supported by decisions of this court. They are referred to in the following cases.² The rules established and laid down by these cases are: 1. Where the conversion is accidental, and under the belief that the person has the right to the property, and acts with no wrongful purpose or intent, the measure of damages is the value of the property at the time of the actual taking and conversion; 2. but, where the original taking is willful and without color or claim of right, the measure of damages is the value of the property at the time and in the condition it is in when demand for its return is made.”³

§ 632. **Same Subject; Property Never in Existence.** — Indeed, this rule of damages has been applied in cases even where the property sued for had never been in existence. Thus, a partner falsely represented that he had grain in storage with his firm of warehousemen, and sold the same. The purchaser suing for the conversion of the grain was held entitled to recover, although evidence that the grain had never been in existence was held to have been improperly admitted. The court said: “The difficulty suggested in regard to proving the value of property which has had no existence is more imaginary than real. The same difficulty would exist in an action to recover for the fraud. The plaintiff in such an action could recover no more than the value of the grain. As the quantity was specified in the receipts, it was his own folly if he advanced more than its value. The market price of ordinary merchantable wheat, etc., would be the criterion of value and the measure of damages.”⁴

§ 633. **Same Subject.** — In a Wisconsin case the sole question before the court was whether the trial court had correctly instructed the jury as to the measure of damages. The instruction complained of was that “If the plaintiff be entitled to recover, he is entitled to recover the highest value of the property within that period of time

¹ *Zindorf v. West. Am. Co.*, 26 Wash. 695, 67 Pac. 355.

² *State v. Shevlin, etc. Co.*, 62 Minn. 99, 64 N. W. 81; *King v. Merriman*, 38 Minn. 47, 35 N. W. 750; *Whitney v. Huntington*, 37 Minn. 197, 33 N. W. 561; *Hinman v. Heyderstadt*, 32 Minn. 250, 20 N. W. 155.

³ *Dolliff v. Robbins*, 83 Minn. 498, 86 N. W. 772, 85 A. S. R. 466.

⁴ *Griswold v. Haven*, 25 N. Y. 595, 82 A. D. 380, to which opinion, however, three of the judges dissented.

from the time it was taken to the present time." This presented the question as to how much may be recovered for the conversion of property of a fluctuating value, which will be presently discussed in detail.¹ As to the general rule of damages, the court said: "The first rule laid down by this court as to the measure of damages, and which is sustained by a large number of cases, is that the damages for which the plaintiff may recover must be legal, natural and proximate consequences of the act complained of; and this rule is equally applied to actions for the breach of contract and for torts. This rule is so well settled, both in this and all other courts, that it is unnecessary to cite other cases to sustain the same. This rule is only qualified in this court where the act complained of is of such a nature as to entitle the plaintiff to recover exemplary or punitive damages, in addition to compensatory damages. . . . The great controversy in the decisions and in the courts is as to what are and what are not compensatory damages, all the courts holding to the rule that compensation is the true measure of damages to be recovered, except where exemplary damages are allowed; and, although there may have been some slight deviation and some dicta suggesting a different rule, the uniform current of opinion in this court has been, that in actions for the tortious conversion of chattels, or for a breach of contract for the non-delivery thereof, in the absence of any proof of circumstances showing that the plaintiff has suffered other specific and particular damages which were the natural and proximate result of the tort or breach of contract, the measure of damages is the value of the property at the time of the conversion, or at the time when the same was to be delivered, with interest thereon from such date to the day of trial." And in summing up, the court further say: "We have concluded, therefore, to adhere to the general rule laid down by the court in the cases cited, and hold that in all actions, either upon contract for the non-delivery of goods or for the tortious taking or conversion of the same 'unless,' in the language of Sedgwick above-quoted, 'the plaintiff is deprived of some special use of the property anticipated by the wrong-doer,' and in the absence of proof of circumstances which would entitle the plaintiff to recover exemplary or punitive damages the measure of damages is, *first*, the value of the chattels at the time and place when and where the same should have been delivered, or of the wrongful taking or conversion with interest on that sum to the date of trial; *second*, if it appears that the defendant, in case of a wrongful taking or conversion, has sold the chattels, the plaintiff may, at his election recover as his damages

¹ *Post*, § 651.

the amount for which the same were sold, with interest from the time of the sale to the day of trial; *third*, if it appears that the chattels wrongfully taken or converted are still in the possession of the defendant at the time of the trial, the plaintiff may, at his election, recover the present value of the same at the place where the same were taken or converted, in the form they were in when so taken or converted. These rules will prevent the defendant from making profit out of his own wrong, will give the plaintiff the benefit of any advance in the price of the chattels, when the defendant holds possession of the same at the time of the trial, and on the whole will be much more equal than the rule given by the court below.”¹

2. WHERE PLAINTIFF OWNER OF SPECIAL INTEREST

§ 634. **Recovery Limited to Value of Special Interest.** — Where an action of trover is brought against the general owner or one claiming under him, by a plaintiff holding only some special or limited interest in the property, the rule generally applied is that the recovery should be responsive only to the value of such special or limited interest, which cannot exceed the value of the goods.² However, if the action be against one who is an entire stranger to the title, a different rule obtains, and the extent of the recovery is measured by the full value of the property, as if the plaintiff were the owner of the entire interest therein. Sedgwick discusses the subject thus: “Where an action for the conversion of a chattel is brought by one having a limited interest in it, he should recover no more than the value of his interest, unless he was in possession at the time of conversion and the defendant was a stranger to the title, in which case he should recover the entire value of the chattel. This principle is illustrated by cases where the goods of a partnership are converted. Each partner is in possession of such goods and may recover the

¹ *Ingram v. Rankin*, 47 Wis. 406, 32 A. R. 762; see further: *New D. Min. Co. v. Old*, 97 Fed. 150, 38 C. C. A. 89; *Hamer v. Hathaway*, 33 Cal. 117; *Tuller v. Carter*, 59 Ga. 395; *Maury v. Coyle*, 34 Md. 235; *Negus v. Simpson*, 99 Mass. 388; *Lack v. Brecht*, 166 Mo. 242, 65 S. W. 976; *McIntyre v. Whitney*, 139 N. Y. App. Div. 557, 124 N. Y. Supp. 234; *Hillebrant v. Brewer*, 6 Tex. 45, 55 A. D. 757; *Flynt v. Chicago etc. Co.*, 38 Mo. App. 94.

² *Ryan v. Young*, 147 Ala. 660, 41 So. 954; *Harvey v. Morse*, 69 N. H. 475, 45 Atl. 239; *White v. Allen*, 133 Mass. 423; *Hurst v. Coley*, 15 Fed. 645; *Haverly v. Elliott*, 39 Neb. 201, 57 N. W. 1010; *Cocke v. Cross*, 57 Ark. 87, 20 S. W. 913; *Wright v. Starks*, 77 Mich. 221, 43 N. W. 868; *Penniman v. Winner*, 54 Md. 127; *Miss. Mills v. Meyer*, 83 Tex. 433, 18 S. W. 748; *Spoor v. Holland*, 8 Wend. 445, 24 A. D. 37; *Bradley Land Co. v. Mfg. Co.*, 104 Me. 203, 71 Atl. 710; *Oronson v. Oppegard*, 16 N. D. 595, 114 N. W. 377; *Wheeler v. Pereles*, 40 Wis. 424; *Hill v. Larro*, 53 Vt. 629; *Canning v. Owen*, 22 R. I. 624, 48 Atl. 1033, 84 A. S. R. 858; *Cramer v. Marsh*, 5 Col. App. 302, 38 Pac. 612; *Clark v. Bell*, 61 Ga. 147.

entire value against a stranger. So on a wrongful sale of partnership goods on writ against one partner, in a suit by the other partner, the entire value of the goods converted can be recovered.¹ But against the other partner, or one entitled to his rights, a partner can recover only half, that being the amount of his legal interest in the property. So in an action by the assignee of one partner for the conversion of the firm property by a sale of it by the other partner, it was held that the measure of damages was the value of plaintiff's undivided interest, without regard to insolvency or the state of the partnership accounts.² But where in an action against a partner, partnership property was attached, and the partner being insolvent, the attaching officer delivered the property to his assignee, it was held that the solvent partner could recover the full value of the property, without reduction on account of delivery to the assignee, since the solvent partner was entitled to the property to close up the partnership.³ . . . Plaintiff, having by contract an interest in railway ties to the amount of ten cents each, in an action for conversion is entitled to the amount reserved to him under the contract, with interest, and not the value of the ties.⁴ By an agreement for the curing of prunes, plaintiff was to have two per cent of their value. The owner converted. It was held that the measure of plaintiff's recovery was the value of his interest in the prunes, that is, two per cent.⁵ The principle is also illustrated by actions for the conversion of garnished or trustee property. Defendants attaching and converting garnished property, with knowledge of the garnishment proceedings, are liable for the amount which plaintiffs would have realized.⁶ In case of the conversion of trustee property taken from the possession of the trustee by the defendant, he is liable in damages to the amount of the judgment in the trustee suit not exceeding the value of the property."⁷

§ 635. **Same Subject.** — The rule is, that wherever the defendant has a legal or equitable interest in or claim upon the specific property for the conversion of which he is sued, the recovery against him is limited to the actual net amount of the plaintiff's interest, although the possession is wrongly assumed or retained. This fully indemnifies

¹ Citing: *Summers v. Heard*, 66 Ark. 550, 50 S. W. 78.

² Citing: *Carrie v. Cloverdale Bkg. Co.*, 90 Cal. 84, 27 Pac. 58; *Doll v. Hennessy Mer. Co.*, 33 Mont. 80, 81 Pac. 625.

³ *Russel v. Cole*, 167 Mass. 6, 44 N. E. 1057, 57 A. S. R. 432.

⁴ *Harvey v. Morse*, 69 N. H. 475, 45 Atl. 239.

⁵ Citing: *Cal. Cured Fruit Assoc. v. Ainsworth*, 134 Cal. 461, 66 Pac. 586.

⁶ Citing: *Focke v. Blum*, 82 Tex. 440, 17 S. W. 770.

⁷ *Deno v. Thomas*, 64 Vt. 358, 24 Atl. 140; cited in 2 *Sedgwick Damages* (9th ed.) 497b.

the plaintiff and leaves the balance of value in the hands of him who is entitled to it, thus settling the whole controversy in one suit.¹ And where plaintiff was an officer suing for the conversion of goods which had been seized by him under execution, it was held that he could recover only a sufficient sum to satisfy the execution.² And if the plaintiff be only the claimant of a lien against the property, while he would be allowed to recover full value of the property for its conversion by one a total stranger to it, yet as against the owner his recovery will be limited to the amount secured by his lien.³ The theory upon which recovery of full value is permitted against a stranger is that, if the plaintiff, either being in actual possession of the property at the time of the conversion, or having the right of immediate possession, has obtained such possession or right thereto from the absolute owner and is bound by contract or otherwise to protect such possession to the end that when the purpose for which he holds the property has been accomplished he may return it to the owner; and if by any act or omission of his, or in the event of his failing to properly protect his possession, said property is converted by a stranger and is wholly lost to the owner, he will be liable to such owner for the full value of the property after deducting the value of his special interest therein. This principle has been thus discussed by the Massachusetts court: "In an action of trover, though the plaintiff's possession of the property has been violated, he waives all claim to damages on account of that violation, and seeks an indemnity only for the loss of his property. Hence it is that the value of the property at the time of the conversion is *prima facie* the measure of damages. Now, if the case is so situated, that the plaintiff can be indemnified by a sum of money less than the full value, there seems to be no reason why it should not be done, as where the plaintiff has a special property, subject to which the defendant is entitled to the goods. For instance, a factor has a lien on goods to half their value. The principal becomes bankrupt, and the property vests in his assignees, subject of course to all legal liens. The assignees denying and intending to contest the factor's lien, get possession of the goods and convert them. The factor brings trover, establishes his lien and recovers. How shall damages be assessed? If he recover the full value of the goods, he will be responsible directly back to the defendants themselves for a moiety of the value. To avoid

¹ Jones v. Horn, 51 Ark. 19, 14 A. S. R. 17.

² Spoor v. Holland, 8 Wend. 445, 24 A. D. 37.

³ Sheldon v. So. Exp. Co., 48 Ga. 625; Hundley v. Calloway, 45 W. Va. 516, 31 S. E. 937.

circuity of action, why should not damages be assessed to the amount of his lien? He is fully indemnified, the balance of the value is in the hands of those entitled to it, and the whole controversy is settled in one suit. If the plaintiff is responsible over to a third person, or if for any cause, the defendant is not entitled to the balance of the value, a very different rule would prevail, and justice would require that the whole value of the property should be assessed to the plaintiff."¹

§ 636. **Illustrations of Special Interests.** — The rules applying to various kinds of special interests will presently be discussed in detail.² I will here give a few illustrations of the rules relating to special interests in general. Thus, where a creditor sued his debtor for the conversion of certain mules for which the creditor held a bill of sale as security for a debt, the measure of damages was held to be the principal and interest of the debt and not the value of the mules.³ Where the owner surrendered possession of goods to one who agreed to pay for them in installments, upon full payment of which they were to become his property, it was held that the owner could maintain trover against a third person who converted the goods before all installments were paid, and the measure of damages was held to be the full value of the property with interest.⁴ The reason of this is two-fold: In the first place the owner was entitled to re-take the entire property from the one to whom he had delivered it on the ground of failure in payment of the remainder of the installments. And in the next place the action was against a stranger to the title, and in such cases, as we have seen, the rule is that the owner of a special interest is entitled to recover the full value.⁵ This rule has been applied to the case of one who has borrowed a chattel who, of course, is bound to re-deliver the chattel to its owner. "The law has placed at the command of the termor the power of vindicating his rights to the property, if they have been violated, and he is bound to use it. And as he is bound to restore the property to the person from whom he obtained it, or to stand responsible in damages for its full value, he has the right to recover its full value from a stranger who has wronged him. Upon this ground of ulterior responsibility, the borrower of a chattel may maintain an action of trespass or

¹ *Chamberlin v. Shaw*, 18 Pick. 278, 29 A. D. 586; see: *Burk v. Webb*, 32 Mich. 179; *King v. Bangs*, 120 Mass. 515.

² See *post*: Pledged Property; Mortgaged Property; Property Sold Conditionally.

³ *Clark v. Bell*, 61 Ga. 147; see *Warner v. Vallily*, 13 R. I. 483.

⁴ *Colcord v. McDonald*, 128 Mass. 470; see: *Messenger v. Murphy*, 33 Wash. 353, 74 Pac. 480.

⁵ *Guttner v. Pacific S. W. Co.*, 96 Fed. 617.

trover against a wrong-doer who has invaded his possession, and it must be obvious that unless he was allowed to recover the full value of the thing of which he was despoiled, the remedy placed at his disposal would not accomplish the purpose for which it was given.”¹ It will then be seen that the special interest of the plaintiff need not be a financial one in order to entitle him to recover the full value against a stranger who meddles with the property. Possession alone is sufficient where the possessor is responsible over to the real owner. And an entire stranger to the title, one not claiming to be in privity with the owner, cannot relieve himself from full responsibility by showing the title to be in one other than plaintiff at the time plaintiff’s possession was wrongfully interfered with.²

§ 637. **Action between Co-tenants.** — The principle permitting the recovery of only the value of the plaintiff’s interest in an action against one other than an entire stranger to the title is exemplified by an action between co-tenants. In one case a part owner of a quantity of spool lumber manufactured the whole of it into spool stock, thereby converting it to his own use. In an action of trover against him by his co-owner, the measure of damages was held to be the value of the plaintiff’s interest.³ The effect of this is merely to constitute a partition between the co-tenants, giving to the plaintiff the value of that which belonged to him, but leaving the defendant in the same situation as if he had bought the interest of the plaintiff in the property. The same is true where the plaintiff is a member of a partnership.⁴ But where an insolvency law gives to the solvent partner the right to retain possession of the firm property so long as he is ready and willing to wind up the affairs of the partnership, such partner may maintain trover for the full value of the property attached under a writ against the other partner.⁵ But even here it is manifest that the recovery of full value does not inure to the sole benefit of the plaintiff partner, for the proceeds go to the satisfaction of the firm’s debts, and if there be any surplus, each partner is entitled to his moiety. A receiver of an insolvent corporation replevied a launch belonging to the estate, in which case the party in possession was decreed to have a lien for labor and materials. The receiver then converted the launch by sale thereof prior to determination of the replevin action. The lien claimant then recovered judgment

¹ *Harker v. Dement*, 9 Gill (Md.) 7, 52 A. D. 670; *Cullen v. O’Hara*, 4 Mich. 137.

² *Bennett v. Gilbert*, 194 Ill. 403, 94 Ill. App. 505, 62 N. E. 847; *Gruman v. Smith*, 81 N. Y. 27.

³ *Wing v. Milliken*, 91 Me. 387, 64 A. S. R. 238; *Holmes v. Sprowl*, 31 Me. 73.

⁴ *Carrie v. Cloverdale Banking Co.*, 90 Cal. 84, 27 Pac. 58.

⁵ *Russell v. Cole*, 167 Mass. 6, 44 N. E. 1057.

against the surety on the replevin bond, but in the replevin suit the value of the property was not determined. It was held that the surety on the replevin bond could recover from the surety on the receiver's bond and could claim only the sum that the property, if sold and turned into money, would have liquidated upon the claim if tried as that of a general creditor.¹ And, in general, a lien-holder, as against the owner, or one in privity with or claiming under him, can recover only to the extent of his lien; but as against a stranger he may recover the full value of the property.² The rule permitting a recovery only to the extent of the plaintiff's interest has been applied to a suit by a life-tenant.³ In a case of this kind shares of stock were converted but the life-tenant died before the trial of the action. The measure of damages was held to be the value of the stock at the death of the life-tenant and not at the time of the conversion.⁴

3. RECOUPMENT WHERE DEFENDANT OWNER OF SPECIAL INTEREST

§ 638. **Recoupment goes in Mitigation.** — The principle of recoupment by a defendant in trover of the value of any interest in the property which he may have goes rather in mitigation of the amount of plaintiff's recovery, although it be such as would give the defendant the right to an independent action against the plaintiff. The general principles of recoupment apply as in cases of contract. The term is not the equivalent of, but rather analogous to set-off. "Before entering upon the subject of set-off minutely, it will be proper to notice a species of defense somewhat analogous to it in character, which a defendant is in some cases allowed to make, and which is called *recoupment*. This is where the defense is not presented as a matter of set-off arising on an independent contract, but for the purpose of reducing the plaintiff's damages, for the reason that he himself has not complied with the cross-obligations arising under the same contract. Thus, in an action to recover compensation for

¹ Southwestern Surety Ins. Co. v. Pac. Coast Casualty Co., (Wash.), 159 Pac. 788.

² Sheldon v. Southern Express Co., 48 Ga. 625; Harris v. Grant, 96 Ga. 211, 23 S. E. 390; Burton v. Randall, 4 Kan. App. 593, 46 Pac. 326; West v. White, 165 Mass. 258, 43 N. E. 103; Plummer v. Green, 49 Neb. 316, 68 N. W. 500; Schmitttdiel v. Moore, 120 Mich. 199, 79 N. W. 195; Hundley v. Calloway, 45 W. Va. 516, 31 S. E. 937; Mantonya v. Outfitting Co., 172 Ill. 92, 69 Ill. App. 627, 49 N. E. 721; Pomeroy v. Smith, 17 Pick. 85; Thew v. Metler, 73 Ia. 742, 36 N. W. 771; Burk v. Webb, 32 Mich. 173; Russell v. McCall, 141 N. Y. 437, 36 N. E. 498.

³ Strong v. Strong, 6 Ala. 345; Russell v. Kearney, 27 Ga. 96; Glascock v. Hays, 4 Dana (Ky.) 158.

⁴ Caulkins v. Gas-Light Co., 85 Tenn. 683, 4 S. W. 287; see Sweeney v. Lomme, 22 Wall. 208, 22 L. Ed. 727.

services rendered, the employer is entitled to show, by way of *recoupment* of damages, loss sustained by him through the negligence of the person employed; and so in regard to a breach of warranty.”¹ The right of recoupment, however, only arises when the damage claimed by the defendant flows from the subject-matter of the original action.² And the damages must have been sustained by the defendant subsequent to the contract but prior to commencement of the original suit.³

§ 639. **When Recoupment Allowed.** — In accordance with the above principles, where a landlord loaned money to his tenant with the understanding that it should be repaid in installments with the rent, but before the amount had been repaid, the tenant sued the landlord in trover for an illegal distraint, the latter attempted to recoup the borrowed money in reduction of damages, but the court refused this, holding that the loan was a distinct debt and not connected with the conversion.⁴ And a defendant was not allowed to invoke the terms of a contract under which he had obtained possession of chattels, but had later repudiated it and converted the property.⁵ But where the defendant had received a note for collection and had afterward been sued for its conversion, he was permitted to recoup the value of his services and his expenses in making collection.⁶ While it is not necessary that the defendant should be the holder of a lien on the property in order to give him the right of recoupment,⁷ yet the existence of such a lien for an amount due the defendant, by virtue of the transaction by which he had possession or the right of possession will be sufficient.⁸ Thus, where a carrier without rights sells goods to enforce his lien thereon for freight, he is guilty of conversion, and is liable to an action therefor in which the measure of damages is the market value of the goods. But in such action the defendant is held entitled to deduct the amount of his lien for freight.⁹ In other words, the carrier was liable for the value of all the right and interest which the plaintiff had in the prop-

¹ Barbour, Set-off, p. 26.

² Keegan v. Kinnare, 123 Ill. 280, 14 N. E. 14; Holaman v. Marsh, 116 Ia. 483, 90 N. W. 82; Brighton Bank v. Sawyer, 132 Mass. 185; Holderman v. Berry, 74 Mich. 424, 42 N. W. 57; Wyckoff v. Bodine, 65 N. J. L. 95, 47 Atl. 23; Forke v. Hermann, 14 Tex. Civ. App. 670, 39 S. W. 210.

³ Harger v. Edmonds, 4 Barb. 256; Hamilton v. Granger Ins. Co., 65 Ga. 750.

⁴ Hubbard v. Rogers, 64 Ill. 434.

⁵ Backenstoss v. Stahler, 33 Pa. 251.

⁶ Turner v. Retter, 53 Ill. 264.

⁷ Baltimore Ins. Co. v. Dalrymple, 25 Md. 269.

⁸ Richardson v. Ashby, 132 Mo. 238, 33 S. W. 806; McCalla v. Clark, 55 Ga. 53; Torp v. Gulseth, 37 Minn. 135, 33 N. W. 550; Lovejoy v. Bank, 5 N. D. 623, 67 N. W. 596.

⁹ Briggs v. Railway Co., 6 Allen (Mass.) 246, 83 A. D. 626.

erty, which was its market value less the amount of freight charges against it. And such is the rule in case of an irregular sale by a pledgee. In one such case the court said: "It would be singular if, having a right to foreclose the pledge, the defendants should be held to have lost their lien and to be liable for the value of the property because, without inflicting any damage thereby on the pledgor, they went the wrong way about the foreclosure, or claimed a greater right than they actually had. We do not think that such is the law."¹

§ 640. **Same Subject.** — A town tax collector sold plaintiff's property after the expiration of the time allowed by statute therefor. Plaintiff sued for a conversion. The court held the measure of damages to be the value of the property less the amount applied to the owner's tax, saying: "Where the property itself has been sold, and the proceeds applied to the payment of the plaintiff's debt, or otherwise to his own use, the reason of the rule ceases, and justice forbids its application. In all such cases the facts may be shown in mitigation of damages."² And if a landlord, having a lien on the tenant's crop, converts it, and is sued for such conversion, he is entitled to have deducted from the damages otherwise allowable, the amount of such lien.³ Plaintiff had assigned as security to defendants' testator a life insurance policy which defendants had wrongfully canceled. In an action for the conversion the measure of recovery was held to be the difference between the market value of the policy with plaintiff's special damages and the amount of the debt due from plaintiff to the defendants.⁴ And in another action for the conversion of a policy of insurance it was said that the measure of damages was the present value of the benefit stated in the policy, less the value of premiums required to procure a similar policy on the same life calculated upon his expectancy of life, when the insured is in good health and his life insurable; but when he is not, this may be shown to reduce his expectancy, and it may also be shown by expert evidence that by reason of ill health a greater rate of premium would be required to reimburse him on account of his shortened expectancy of life, and if, from a computation of the present value of the benefit and the present value of the premiums to be paid during

¹ Whipple v. Dutton, 175 Mass. 365, 56 N. E. 581, 78 A. S. R. 501; citing Dahill v. Booker, 140 Mass. 308, 54 A. R. 465; Farrar v. Paine, 173 Mass. 58.

² Pierce v. Benjamin, 14 Pick. 856, 25 A. D. 396; see, however, Bringard v. Stellwagen, 41 Mich. 54, 1 N. W. 909.

³ Jones v. Horn, 51 Ark. 19, 9 S. W. 309, 14 A. S. R. 17; see Cocke v. Cross, 57 Ark. 87, 20 S. W. 913; Rall v. Cook, 77 Mich. 681; Van Werden v. Winslow, 117 Mich. 564, 76 N. W. 87.

⁴ Wheeler v. Pereles, 43 Wis. 332.

the life, the value of the benefit is greater than the value of the premiums the difference is the measure of damages for the conversion.¹

§ 641. **Same Subject; Deducting Amount due Defendant.** — Where a warehouseman converts pledged property by a wrongful delivery to the pledgor, the pledgee is entitled to recover from him only the amount of his loan.² The owner of a watch was allowed to recover of a pawnee the value of the watch less advances made by the pawnee to the owner's agent, it appearing that the pawnee had sold without notice.³ Plaintiff sued defendant for the value of his labor, and it appeared that he had carried away the plaintiff's tools and converted them. The plaintiff was held entitled to recoup the value of the tools.⁴ So, where a bailee is sued for the conversion of property, his lien for labor thereon is a proper subject of recoupment.⁵ But where the hirer of a chattel successfully defended an action of trover brought against him by his bailor, it was held that the expenses of the defense could not be recouped in an action for the hire.⁶ An officer attaching goods paid freight due on them. Another person had a lien on them for advances and demanded payment of the lien or release of the attachment. The officer refusing, it was held in an action of trover against him that he was entitled to deduct the amount paid by him for freight.⁷

4. VALUE

§ 642. **Market Value.** — In measuring damages for a conversion the principles governing the amount of recovery are based upon the idea that the injured party must be justly compensated for the loss he has sustained by reason of the injury. And this is the general rule ramifying the entire law of damages whether the cause of complaint be for tort or breach of contract. And where the subject-matter is personal property, the injured party is indemnified if his recovery be measured by an amount of money which will enable him to replace the property and thereby put himself in the same position he occupied before the injury complained of. Thus arises the rule fixing the amount of damages as the market value of the article,

¹ *Barney v. Dudley*, 42 Kan. 212, 21 Pac. 1079, 16 A. S. R. 476.

² *Fifth Nat'l Bank v. Warehouse Co.*, 17 R. I. 112, 20 Atl. 203.

³ *Van Arsdale v. Joiner*, 44 Ga. 173.

⁵ *Longstreet v. Phile*, 39 N. J. L. 63.

⁴ *Brigham v. Hawley*, 17 Ill. 38.

⁶ *Deens v. Dunklin*, 33 Ala. 47.

⁷ *Clark v. Dearborn*, 103 Mass. 335; see *Hamilton v. Law*, 24 Neb. 59; *Boydston v. Morris*, 71 Tex. 697; *Burk v. Webb*, 32 Mich. 173; *Boutell v. Warne*, 62 Mo. 350; *Hatheway v. Bank*, 131 Mass. 14; *Blackmer v. Ry. Co.*, 101 Mo. App. 557, 73 S. W. 913; *Straw v. Jenks*, 6 Dak. 414, 43 N. W. 941; *Fowler v. Gilman*, 13 Metc. (Mass.) 267; *Cooper v. Newman*, 45 N. H. 339.

which, however, is more in the nature of a rule of evidence than of an arbitrary standard. The real value of the article is the standard by which the damages are measured; but if it be bought and sold in the market, the price at which it could be so bought and sold furnishes conclusively the basis for determining what it would cost the injured party to place himself in the position he occupied before the property was interfered with, and therefore shows the extent of his injury. Where the property is such that it has no market value, of course the measure of compensation must be arrived at in a different manner, the principles of which will be presently discussed.

§ 643. **How Market Value Determined.** — The market value of an article of personal property is determined in the same manner as that of realty. This has been succinctly defined to be “the sum of money which a person desiring, but not compelled, to buy, and an owner willing, but not compelled to sell, would agree on as a price to be given and received therefor.”¹ The market value of land at any time is the price that would in all probability result from fair regulation, where the seller is willing to sell and the buyer desires to buy.² This value, of course, must be determined upon a standard of money, and not what it would sell for under special circumstances, but its actual market value in cash.³ “To make a market there must be buying and selling, purchase and sale. If the owner of an article holds it at a price which nobody will give for it, can that be said to be its market price? Men sometimes put fantastical prices on their property.”⁴ “Where the subject of the price is an article commonly dealt in, this price will be fixed in a more or less definite sum by the consensus of all the buyers and sellers dealing in the article. The term ‘market’ assumes the existence of trade and the price is fixed in trade by the highest bidder and the lowest offerer.”⁵ The meaning of “market price” is the price at which such articles are sold and purchased clear of every charge except such as is laid upon it at the time of sale.⁶ It follows that as a mere offer of property at a stated price is insufficient to establish a market value, neither is such value created by an unaccepted proposal to buy.⁷ The criterion should be the market price of similar property bought

¹ *Carlor Oil Co. v. Franzell*, 33 Ky. S. R. 98, 109 S. W. 328; *Allen v. Chicago, etc. Ry. Co.*, 145 Wis. 263, 129 N. W. 1094.

² *Sharpe v. U. S.*, 112 Fed. 893, 50 C. C. A. 597, 57 L. R. A. 932.

³ *Brown v. Calumet Ry. Co.*, 125 Ill. 600.

⁴ *Blydenburgh v. Welsh*, 1 Baldw. (Pa.) 331.

⁵ *Cary Litho. Co. v. Book Co.*, 127 N. Y. Supp. 300.

⁶ *Goodwin v. U. S.*, 2 Wash. C. C. 493.

⁷ *Lovejoy v. Michels*, 88 Mich. 15, 49 N. W. 901, 13 L. R. A. 770.

and sold in like quantities. Proof of isolated sales is insufficient.¹ Neither will the consideration paid for the particular property suffice,² nor the cost of production,³ nor, ordinarily, the proceeds derived from a sale of the property.⁴ So, where chattels were wrongfully sold by an officer under attachment, it was held that the price received was no criterion of their value at the time of their conversion.⁵ But it had earlier been said by the court of the same state: "If the sale was at or near the time of conversion, or, if any appreciable time had intervened, it be shown that there had been no change in the goods or in their market value, evidence of the prices for which they sold at auction is admissible on the question of their value."⁶ In sustaining this latter view, the Massachusetts court said relative to a sale under execution: "A sale is matter of fact, not of opinion, and is direct evidence of the real worth of the thing sold. Indeed the price for which an article is bought and sold constitutes its market value, and is ordinarily the best and most satisfactory standard by which to estimate the amount at which the same or similar articles are to be appraised in the assessment of damages. The competency of such evidence cannot be made to depend on the form or mode or particular terms of the contract of sale. These circumstances may have an essential bearing on the weight to be given to the fact of sale as affecting the price and as indicating the true value of the property, and they are proper for the consideration of the jury. But they cannot operate to exclude the evidence altogether. In many cases a sale by auction would furnish very strong, if not decisive, evidence of value. An auction of stocks, for example, at the public exchange in a large commercial city, affords the truest standard of prices at which they are estimated in the market; on the other hand, a similar sale of the same kind of property in an obscure village, attended only by a few persons, might be very feeble and unsatisfactory evidence of the real value of the shares. No one can doubt that the fact of the former sale would be admissible on the question of value. Equally so would the latter. The evidence is of the same species in both instances; the only difference between them is in the weight to which the fact is entitled. This consideration disposes of the arguments urged against the competency of the evidence

¹ *Cobb v. Whitsett*, 51 Mo. App. 146; *Hammond v. Decker*, 102 S. W. 453 (Tex. Civ. App.).

² *Kingsbury v. Smith*, 13 N. H. 109.

³ *Gunn v. Burghart*, 47 N. Y. Supp. 370.

⁴ *Sigel-Campion Co. v. Holly*, 44 Col. 580, 101 Pac. 68.

⁵ *Maul v. Drexel*, 55 Neb. 446, 76 N. W. 163.

⁶ *Imhoff v. Richards*, 48 Neb. 590, 67 N. W. 983; see *Campbell v. Woodworth*, 20 N. Y. 499; *Brigham v. Evans*, 113 Mass. 540.

which was rejected at the trial of the case at bar. It is said that the sale of the property in controversy was a forced one, under legal process, in which the necessity of disposing of the property would take away one of the essential features by which prices are fixed and regulated, inasmuch as the seller could have no voice in fixing the sum at which each article was sold. This is an argument which goes to the weight, not to the competency of the evidence. It would apply with equal force to every sale at auction, which, when fairly conducted, whether under legal process or not, if no minimum price is fixed on the property offered, is made to the highest bidder, the seller having no option as to taking or refusing the price offered. But such sales are nevertheless ordinarily supposed to be a fair test of value, the inference being a reasonable one and according to common experience, that competition among purchasers will carry the price up to the real worth of the property offered.”¹

§ 644. **Whether Wholesale or Retail Value Taken.** — Where chattel property involved consists of a stock of goods, the inquiry cannot be as to the value of the various articles at retail prices, but the wholesale value is to be determined.² As tending to show the market price of an article of personalty, price-lists are admissible, stating the prices at which a manufacturer will sell, or statements of dealers in answer to inquiries.³ Likewise, because market reports come from a public authentic source which is deemed to give their reliability, the hearsay rule has been relaxed in the case of such reports. The earlier decisions have established the rule that market reports shown to be in general circulation and relied on by the commercial world and by those engaged in trade are admissible as evidence of market values of articles of trade.⁴ It will be observed, however, that such matters are only evidence to assist the jury in arriving at the market value of the chattel, and are not conclusive of such value.

§ 645. **Place of Fixing Value.** — The general rule in trover, subject, of course, to exceptions which will be discussed later, is that the plaintiff shall recover the value of the goods at the place of con-

¹ *Kent v. Whitney*, 9 Allen 62, 85 A. D. 739; see *Perkins v. Ewan*, 66 Ark. 175, 49 S. W. 569; *Parmenter v. Fitzpatrick*, 135 N. Y. 190, 31 N. E. 1032.

² *Little v. Lichkoff*, 98 Ala. 321, 12 So. 429; *Frick v. U. S. Ins. Co.*, 218 Pa. St. 409, 67 Atl. 743; *Wehle v. Haviland*, 69 N. Y. 448; *State v. Smith*, 31 Mo. 566; *Cunningham v. Engar*, 9 N. Mex. 105, 49 Pac. 910; *Crymble v. Mulvaney*, 21 Col. 203, 40 Pac. 499; *John Blaul & Sons v. Wandel*, 137 Ia. 301, 114 N. W. 899; *Cerney v. Paxton, et al.*, 83 Neb. 88, 119 N. W. 14; *Bradley v. Barin*, 53 Kan. 628, 36 Pac. 977.

³ *Lush v. Druse*, 4 Wend. 313; *Cliquot's Champagne*, 70 U. S., (3 Wall.) 114, 18 L. Ed. 116.

⁴ See extended note in *Ann. Cas.* 1913E, 210 to case of *Wilbur v. Buckingham*, 153 Ia. 194, 132 N. W. 960.

version.¹ Thus, in an action for the conversion of a stock of hardware, the damages were to be computed on its value at the place of conversion rather than at a distant city where it could be bought at wholesale.² Logs which belonged to plaintiff were taken from his land by the defendant into another county where they were made into lumber by the latter. It was held that the plaintiff might treat the removal as a conversion and recover the value of the logs on his land, or elect to consider the sawing into lumber the conversion and recover their value at that place.³ Where it was claimed that a horse had been converted by defendant at a place where he had hired it to be driven, the court held that plaintiff could show the value of the horse when it left the stable, together with evidence as to whether or not its condition had changed prior to the conversion.⁴ One court has said as to the general rule: “ ‘Place,’ as used in this connection, was indefinite and uncertain. If adopted, it might have misled the jury by its being supposed to limit them in ascertaining the value of the property to inquiries as to sales made upon the precise spot where the conversion took place, or its immediate vicinity. Within such a circumscribed range, it may have been impossible to find that the property had there acquired any marketable value.”⁵

§ 646. **Market Value at Place of Conversion.** — The general rule that the amount of recovery is measured by the market value at the place of conversion, applies where there is a market value at such place. But it frequently occurs that there is no market value of the particular chattel at the place of conversion, and in such case the value in the nearest market is the criterion.⁶ Thus, in an action for a schooner which had been beached at a place where it had no market value, it was held that the damages would be determined by the value at some near port where there was a market for such vessels, deducting the probable cost of getting her to the market; this deduction including the cost of getting her off the beach, and of repairs, and a reasonable allowance for diminution in value on account of her

¹ U. S. M. Co. v. Holt, 185 Mass. 97, 69 N. E. 1056; Hill v. Canfield, 56 Pa. St. 454; Davidson v. Kolb, 95 Mich. 459, 55 N. W. 373; Fleischmann v. Samuel, 18 N. Y. App. Div. 97, 45 N. Y. Supp. 404; Hussam v. Lumber Co., 82 Vt. 444, 74 Atl. 197; T. J. Moss Tie Co. v. Myers, — (Ky.) — 116 S. W. 255; Wright v. Skinner, 34 Fla. 453, 16 So. 335; Gensbury v. Field, 104 Ia. 599, 74 N. W. 3; Tucker v. Hamlin, 60 Tex. 171; Spicer v. Waters, 65 Barb. 227.

² Gentry v. Kelley, 49 Kan. 82, 30 Pac. 186.

³ Final v. Backus, 18 Mich. 218.

⁴ Stilwell v. Farewell, 64 Vt. 286, 24 Atl. 243.

⁵ Selkirk v. Cobb, 13 Gray 313.

⁶ Wallingford v. Kaiser, 119 N. Y. 392, 84 N. E. 295, 123 A. S. R. 600, 15 L. R. A. (N. S.) 1126; Tiffany v. Lord, 65 N. Y. 310; Boylston Ins. Co. v. Davis, 70 N. C. 485; Fort v. Saunders, 5 Heisk. 487; Peterson v. Gresham, 25 Ark. 380; Dyer v. Rosenthal, 45 Mich. 588, 8 N. W. 560.

having been beached.¹ It will be noticed from the cases that in some the cost of transportation to the nearest market is added to the market value as an item of recovery,² while in others this cost is deducted.³ Sedgwick remarks upon this necessity thus: "It may, however, be that the cost of transportation is to be subtracted from the value at the nearest market instead of added to it. That depends on whether the nearest market is resorted to by persons from the place where the plaintiff is entitled to the property for purchase or for sale; that is, whether the value in that market is less or greater than the value where the property should be. This is a question of fact which will never prove to be difficult of proof; the facts of the case will determine it. So, where goods are purchased with a view to sending them for sale to a neighboring market, and there is no market price at the place of delivery, the market price at the place to which they were to be sent, less the cost of transportation, is the measure of their value at the place of delivery;⁴ and knowledge on the part of the vendor of the destination is not necessary.⁵ If, however, it is not proved that the market is in fact the *nearest*, such knowledge would seem to be necessary.⁶ So in an action on the defendant's promise to pay for logs which he had converted on their way down the river to the plaintiff's mill, evidence is admissible of their market price at the mill, and of the cost of their transportation from the place of conversion."⁷ In an action for conversion of plows in Wisconsin, it appeared that they were of a peculiar make for special sale in Nebraska and without market value in Wisconsin. The measure of damages was held to be the market value of the plows in Nebraska together with the cost of getting them there and selling them.⁸

§ 647. **Market Value of Goods in Transit.** — If the goods are in transit when the conversion occurs, their market value at their destination is the standard of recovery.⁹ The reason upon which this is based is that if the rule were otherwise the owner would be forced

¹ Glaspy v. Paine, 34 Hun 167.

² Bullard v. Stone, 67 Cal. 477; B. B. Ford Co. v. Lawson, 133 Ga. 237, 65 S. E. 444; Long P. L. Co. v. Saxon Co., 108 Va. 497, 62 S. E. 349; Berry v. Dwinel, 44 Me. 255.

³ Hallett v. Novion, 14 Johns (N. Y.) 273; Hodson v. Goodale, 22 Ore. 68, 29 Pac. 70; Bourne v. Ashley, 1 Low. (N. Y.) 27; Saunders v. Clark, 106 Mass. 331.

⁴ Citing Johnson v. Allen, 78 Ala. 387; Union P. D. Co. v. Williams, 3 Col. App. 526, 34 Pac. 731; Hodson v. Goodale, 22 Ore. 68, 29 Pac. 70.

⁵ Citing McDonald v. Unaka T. Co., 88 Tenn. 38, 12 S. W. 420.

⁶ Citing Cockburn v. Lumber Co., 54 Wis. 619, 12 N. W. 49.

⁷ 1 Sedgwick, Damages, 246, citing Saunders v. Clark, 106 Mass. 331.

⁸ Lathers v. Wyman, 76 Wis. 616, 45 N. W. 669; see Spicer v. Waters, 65 Barb. 227.

⁹ Blackmer v. Cleveland Ry. Co., 101 Mo. App. 557, 73 S. W. 913.

to sell in a market which he had not chosen.¹ This liability was imposed upon an intermediate consignee who had converted the goods consigned.² The Georgia court has held the presumption to be that the value is the same at the place of destination as that of shipment; and where a carrier was held for the loss of cotton, the plaintiff proved the value at the point of destination, which was held sufficient by the court.³

§ 648. **Time of Fixing Value.** — Exclusive of property of fluctuating value to be discussed in the next sub-division, the general rule, whether the goods involved had a market value or not, is that the damages in trover shall be determined as of the time of the conversion.⁴ This rule was ably discussed in a Maine case in which the plaintiff claimed that the conversion of timbers had taken place when they were sawn into spool stock and that damages should be assessed as of that time, while the defendant contended that the damages should be assessed as of the time when the timbers were severed from the land. The opinion in the case is sufficiently instructive to merit notice at some length. The court said: ⁵ “The measure of damages ordinarily in an action of trover is the value of the property at the time of conversion, with interest from the time when the cause of action accrues.⁶ In the present case, we are unable to perceive any reason for departing from the general rule, and allowing damages only for the value of the birch when severed from the land as contended by the defendant. We have given the question considerable attention, and examined the authorities relied on in support of the proposition set up in deduction of damages, but we feel that the present case is one where any rule other than the value of the property at the time of the conversion does not apply. It has sometimes been held that where timber has been cut by trespassers, and the trespass was involuntary and not willful, the owner should recover

¹ *Farwell v. Price*, 30 Mo. 587.

² *Farwell v. Price*, *supra*.

³ *Rome Ry. Co. v. Sloan*, 39 Ga. 636; see *Richmond v. Bronson*, 5 Denio 55; *Waltingford v. Kaiser*, 84 N. E. 295, 191 N. Y. 392.

⁴ *Brooks v. Rogers*, 101 Ala. 111, 13 So. 386; *Sigel-Campion Co. v. Holly*, 44 Col. 580, 101 Pac. 68; *Hurd v. Hubbell*, 26 Conn. 389; *Moody v. Caulk*, 14 Fla. 50; *Doyle v. Burns*, 123 Ia. 488, 99 N. W. 195; *Hart v. Brierly*, 189 Mass. 598, 76 N. E. 286; *Weed v. Oliver*, 21 Pick. 559; *Sedgwick v. Place*, 12 Blatch. (U. S.) 163; *Yater v. Mullen*, 24 Ind. 277; *Robinson v. Alexander*, 141 Ill. App. 192; *Allsopp v. Machine Works*, 5 Cal. App. 228, 90 Pac. 39; *In re Jamison*, 163 Pa. St. 143, 29 Atl. 1001; *Davis v. Granite Co.*, 75 Vt. 286, 54 Atl. 1084; *Simpson v. Alexander*, 35 Kan. 225; *Mer. Nat'l Bank v. Williams*, 110 Md. 334, 72 Atl. 1114; *Nesbitt v. Lumber Co.*, 21 Minn. 491; *Zindorf v. West etc. Co.*, 26 Wash. 695, 67 Pac. 355.

⁵ *Wing v. Milliken*, 91 Me. 387, 40 Atl. 138, 64 A. S. R. 238.

⁶ Citing *Washington Ice Co. v. Webster*, 62 Me. 341, 16 A. R. 462; *Johnson v. Sumner*, 1 Mete. 172.

his actual loss, and not the increased value added by the trespasser. Such was the case of *Foot v. Merrill*, 54 N. H. 490, 20 A. R. 151, but that was an action of trespass *quare clausum* and not an action of trover, and in the course of the opinion the courts say that the plaintiff might have maintained replevin for the timber, or he might 'have recovered its full value at the time it was carried away by bringing trover.'

"Another case from the same court is *Beede v. Lamphrey*, 64 N. H. 510, 10 A. S. R. 426, which was an action of trover by the owner to recover the value of two hundred spruce logs cut by the defendant and hauled to his mill, and the court in an elaborate opinion held that the measure of damages was the value of the trees immediately after they were severed from the realty, without any increased value added for transporting them to defendant's mill. Thus the trespass was not willful, and the cutting over on plaintiff's land was by mistake. But it will be noticed that the suit was against the trespasser, and the court say that 'the defendant converted the logs by cutting and severing the trees from the land, and the conversion being complete by that wrongful act, their value there represents the plaintiff's loss,' and held that the damages must be according to the usual rule in trover, which is the value of the property at the time of conversion and interest after.

"The recent case of *Powers v. Tilley*, 87 Me. 34, 47 A. S. R. 304, was an action of trover against a purchaser of sleepers made from trees cut on the plaintiff's land by a trespasser, and by him manufactured into sleepers, and the rule of damages was held to be the value of the sleepers at the time of their conversion by the purchaser, and no deduction was made for the increased value put upon the trees by the labor of the trespasser before conversion by the purchaser.

"The case of *Glasby v. Cabot*, 135 Mass. 435, was an action of tort in the nature of trover, and the same rule was applied. In that case the master of a vessel which had drifted upon a beach in a damaged condition, sold her without right to a person who, after repairing her, getting her off, and taking her into port, sold her hull to another person. The action was by the owner against the latter, and the court there held the measure of damages to be the value of the hull at the time and place of conversion, with interest thereafter. And the court there say as was said by the court in *Powers v. Tilley* that in replevin for the same property any improvements upon it attach and go with the property replevied to the owner, and that 'the rule of confining the damages to the time of the conversion, with interest from that time, has been adopted in our commonwealth as the most

satisfactory; and many difficulties are avoided which arise under any other rule when the value of the property is fluctuating, or when the property has been improved in value or changed in form by the wrongful taker after the conversion and before the trial. In the event of successive conversions, if the value of the property at the time of the first conversion were always taken as the test of damages, then it might often happen that a defendant who had subsequently converted the property could be held to pay more than the property was worth when he converted it. The damages caused by one wrong would be measured by those caused by another.'

"If we examine the earlier decisions in our state, we find no real conflict with the doctrine here enunciated. The case of *Cushing v. Longfellow*, 26 Me. 306, was an action of trespass *de bonis* for mill logs, and the plaintiff waived the breaking, entering and cutting, and there it was held that the measure of damages was the value as it was the moment after they were severed, and that the plaintiff had no right to select any other place than that where the injury was originally done, although he might have replevied the logs at a later stage after they had become more valuable; and the opinion of the court states he 'might have demanded them at another place, of one having them there, and in an action of trover, have recovered the value of them there.' This certainly is in accordance with the general rule of damages, the value at the time of conversion.

"So in *Moody v. Whitney*, 38 Me. 177, 61 A. D. 239, which was trover for mill logs cut upon the plaintiff's land by the defendant and hauled by him two or three miles, the same measure of damages was adopted, it being held that the plaintiff could not recover the enhanced value of the logs without evidence of a distinct conversion after they were hauled, as if the plaintiff had regained possession, and there had been a subsequent conversion by the defendant. In this case the court recognized and approved the general rule, and held that the conversion by the defendant was at the time of his cutting the timber, and therefore the damages were necessarily the value immediately after it was cut, and had become personal property.

"The distinction in these cases to which we have referred, and the case at bar, should be borne in mind — the time when the conversion by the defendants took place — and when that is done, and the rule applied, much of the seeming difficulty in the application of the rule vanishes. The trouble is not in the rule, but in applying it to the facts of each particular case. Facts which may be held to constitute conversion in one case may so vary in another as to lead the court to conclude that conversion took place at an entirely different

time, and with a material difference, therefore, in the amount of damages to be awarded.”¹

§ 649. **Time of Conversion Usually Governs.** — It will thus be seen that in applying the general rule as to when the damages are to be computed, the essential element to be determined is the precise time when the conversion occurred. This of course is to be resolved according to the principles previously discussed as to what acts amount to a conversion. If the conversion consists of a demand and refusal of possession, the time when they were made will be regarded as the date to which inquiries as to value are to be directed.² I have already discussed the effect of a demand and a refusal of possession in the law of conversion.³ It was there said to be the rule that a refusal to restore the goods upon demand therefor is not in itself a conversion but only evidence of it, and that it is unnecessary to prove it when the conversion can be shown in any other way.⁴ If a conversion has occurred prior to a demand and refusal, the damages must be measured as of the time of the previous conversion.⁵

§ 650. **Exceptions to General Rule.** — An apparent exception to the general rule occurred in a case wherein a corporation had converted shares of stock issued by it during the existence of a life estate therein. The court held the corporation liable to the reversioner for the value of the shares, not from the date of the conversion, but from the time of the death of the life-tenant, with interest from that date.⁶ And in a Massachusetts case it was held that the value of stock fraudulently taken by promoters for services, for which they were required to account to the corporation, is to be fixed, not as of the time of the taking, when it had no value, but at the time when, by the launching of the corporation, its value was established.⁷ It

¹ See *White v. Martin*, 1 Port. 215, 26 A. D. 365; *Clark v. Whitaker*, 19 Conn. 319, 48 A. D. 160; *Omaha, etc. Co. v. Tabor*, 13 Col. 41, 16 A. S. R. 185; *Wooden Ware Co. v. U. S.*, 106 U. S. 432; *Vaughan v. Webster*, 5 Har. (Del.) 256; *Sherman v. Finch*, 71 Cal. 68, 11 Pac. 847; *Hopkins v. Dipert*, 11 Okla. 630, 69 Pac. 883; *Arrowsmith v. Gordon*, 3 La. Ann. 110; *Green v. Stephens*, 37 Mo. App. 641; *Heinekamp v. Beaty*, 74 Md. 388, 21 Atl. 1098, 22 Atl. 67; *Parsons v. Martin*, 11 Gray 111; *Hunt v. Boston*, 183 Mass. 303, 67 N. E. 244; *Allen v. Kinyon*, 41 Mich. 281, 1 N. W. 863; *Boylan v. Huguet*, 8 Nev. 345; *Andrews v. Durant*, 18 N. Y. 496; *Towne v. Elevator Co.*, 8 N. D. 200, 77 N. W. 608; *Daugherty v. Lady*, (Tex. Civ. App.) 73 S. W. 837.

² *Garrard v. Dawson*, 49 Ga. 434; *Northern Transp. Co. v. Sellick*, 52 Ill. 249; *Hendricks v. Evans*, 46 Mo. App. 313; *Dows v. Bank*, 91 U. S. 618, 23 L. Ed. 214; *Walley v. Bank*, 14 Utah 305, 47 Pac. 147; *Carter v. Feland*, 17 Mo. 383; *Doliff v. Robbins*, 83 Minn. 498, 86 N. W. 772, 85 A. S. R. 466.

³ *Ante*: §§ 323 *et seq.*

⁴ *Hogan v. Elevator Co.*, 66 Minn. 344, 69 N. W. 1.

⁵ *Becker v. Feigenbaum* (Cal.), 46 Pac. 837; *Zindorf v. Western Am. Co.*, 26 Wash. 695, 67 Pac. 355.

⁶ *Caulkins v. Gas Light Co.*, 85 Tenn. 683, 4 S. W. 287, 4 A. S. R. 786.

⁷ *Hayward v. Leeson*, 176 Mass. 310, 57 N. E. 656, 49 L. R. A. 725.

has been held, however, that unless proof is adduced of a change in the property in the meantime evidence of the value of the property a few days before the conversion will be sufficient.¹ Where attached property was left in the plaintiff's possession until execution had issued upon the judgment obtained in the case, the measure of damages was taken as of the time the property was taken on the execution.² So it was held that the measure of damages for the conversion of a judgment in favor of a partnership by a former member of the firm who wrongfully discharged it was the value of the judgment at the time of the conversion; but in order to show such value, evidence was admitted as to the subsequent solvency of the judgment debtors.³ The court said: "In the case of the conversion of a chattel where the market value fails to furnish the true measure of damages, the plaintiff may show by any appropriate evidence the actual injury from the loss of the possession of the chattel, and evidence of the value of such property prior or subsequent to the conversion, is admissible to prove actual value at the time of the conversion." Where bonds in defendant's possession were stolen, the damage was assessed as of the time of the theft rather than the date of a demand, it appearing that the theft resulted from defendant's negligence.⁴ Where defendants, having plaintiff's bonds, bought them at their own auction sale, but later re-sold them at a private sale, it was held that the latter sale constituted the conversion, and the damages were measured as of that date.⁵

§ 651. **Property of Fluctuating Value.** — As to the time at which damages for the conversion of property of a fluctuating value shall be assessed there is a hopeless diversity of opinion among the courts. This character of property consists chiefly of stocks and bonds, and the books abound in cases where this question relating to such property has arisen. In this regard some states have adopted the general rule, allowing the recovery of damages as of the date of the conversion with interest.⁶ Where the courts hold this, the application of the rule, of course, is not difficult. But in many other jurisdictions the courts give to the plaintiff the benefit of what is called a higher

¹ *McLennan v. Elevator Co.*, 57 Minn. 317, 59 N. W. 628.

² *Henshaw v. Bank*, 10 Gray 568.

³ *Langford v. Rivinus*, 75 Fed. 959, 21 C. C. A. 581, 33 L. R. A. 250.

⁴ *Third Nat'l Bank v. Boyd*, 44 Md. 47, 22 A. R. 35.

⁵ *Tyng v. Warehouse Co.*, 58 N. Y. 308.

⁶ *Cont. Divide Min. Co. v. Biley*, 23 Col. 160, 46 Pac. 633; *Brewster v. Van Liew*, 119 Ill. 554, 8 N. E. 842, 59 A. R. 823; *Baltimore Ins. Co. v. Dalrymple*, 25 Md. 244; *Noonan v. Ilsley*, 17 Wis. 314, 84 A. D. 742; *Fisher v. Brown*, 104 Mass. 259, 6 A. R. 235; *White v. Salisbury*, 33 Mo. 150; *Frothingham v. Morse*, 45 N. H. 545; *Bowker v. Goodwin*, 7 Nev. 135.

intermediate value, which means that the measure of damages shall be the highest market price which the property may have reached at any time from the date of the conversion to the time of trial. The doctrine denying the rule of highest intermediate value has been well explained in a New Hampshire case,¹ which, while not an action of trover, involved the principles applicable to trover: "There being, then, much conflict in the authorities, the question is to be settled upon principle; and it may be assumed that the plaintiff is entitled to such damages as will be a full indemnity for withholding the stock. The general rule is, undoubtedly, that he shall have the value of the property at the time of the breach; and this is a plain and just rule and easy of application, and we are unable to yield to the reasons assigned for the exception which has been sanctioned in New York and elsewhere. It is true that, in some cases, the plaintiff may have been injured to the extent of the value of the property at the highest market price between the breach and the time of trial. But it is equally true that, in a large number of cases, and, perhaps, generally, it would not be so. In that large class of cases where the articles to be delivered, entered into the common consumption of the country, in the shape of provisions, perishable or otherwise, horses, cattle, raw material such as wool, cotton, hides, leather, dye-stuffs, etc., to hold that the plaintiff might elect as the rule of damages in all cases, the highest market price between the time fixed for the delivery and the day of trial, which is often many years after the breach, would, in many cases, be unjust, and gives to the plaintiff an amount of damages disproportioned to the injury. For in most of these cases, had the articles been delivered according to the contract, they would have been sold or consumed within the year, and no probability of reaping any benefit from the future increase of prices. So there may be repeated trials of the same cause by review, new trial or otherwise. Shall there be a different measure of value at each trial? In the case of stocks, in regard to which the rule in England originated, there are, doubtless, cases, and a great many, where they are purchased as a permanent investment, and to be held without regard to fluctuations; and to hold that the damages should be the highest price between the breach and trial, when there is no reason to suppose that a sale would have been made at that precise time, would also be unjust. But it may be fairly assumed that a very large portion of the stocks purchased, are purchased to be sold soon; and to give the purchaser, in case of a failure to deliver such stock, the right to elect their value at any time before the trial, which might

¹ *Pinkerton v. Manchester Ry. Co.*, 42 N. H. 424.

often be several years, would be giving him not indemnity merely, but a power, in many instances, of unjust extortion, which no court could contemplate without pain.”¹

§ 652. **Same Subject; Holding of New York Courts.** — Actions for the conversion of chattels of this character have frequently been before the courts of the state of New York, due to the fact that most of the transactions in stocks and bonds in this country take place there. A case involving the conversion of shares in a railway corporation held as collateral security came up for decision in 1863.² In disposing of the question as to the proper measure of damages, the court said: “Although the general rule of damages in trover may be the value of the chattel at the time of its conversion, with interest, or that value when the chattel has a determinate or fixed value, yet, when there is any uncertainty or fluctuation attending the value, and the chattel afterwards rises in value, the plaintiff can only be indemnified by giving him the price of it, at some period subsequent to the conversion; and the necessary result of all the decisions, in my judgment, is that in such cases the plaintiff is entitled to recover the highest market value of the property at any time intermediate the conversion and the trial.” This doctrine was in a measure departed from in the case of *Brass v. Worth*, 40 Barb. 648, but was re-affirmed in the case of *Burt v. Dutcher*, 34 N. Y. 493, and in *Morgan v. Gregg*, 46 Barb. 183. The question again came up to the court in the case of *Scott v. Rogers*, 31 N. Y. 676, 4 Abb. Pr. 157, and received most careful consideration. The court there said: “In the absence of any definite means of ascertaining the period when the owner of the property would have disposed of it, we are necessarily more or less in the dark as to the amount of injury which he has sustained by the illegal act of the defendants, and are driven to resort more or less to conjecture, or to fix upon some arbitrary period for determining the price of the property. It is obviously a rule of doubtful justice to give to the plaintiff the whole period until the statute of limitations would attach, for the commencement of this action, and the whole period intervening between the conversion and the trial to select his standard of price, without ever having given notice of his intention to adopt the price of any particular period. A much more just and equitable rule, independent of adjudications

¹ See to the same effect: *St. Peters Church v. Beach*, 26 Conn. 356; *Vance v. Towne*, 13 La. 225; *Wyman v. American P. Co.*, 8 Cush. 168; *Bates v. Stansell*, 19 Mich. 91; *Fosdick v. Greene*, 27 Ohio St. 484; *Gravel v. Clough*, 81 Ia. 272, 46 N. W. 1092; *Watt v. Potter*, 2 Mason (U. S.) 77; *Arrington v. Ry. Co.*, 51 N. C. 68; *Stewart v. Bright*, 6 Houst. (Del.) 344.

² *Romaine v. Van Allen*, 26 N. Y. 309.

upon this question, would seem to be to allow to the plaintiff some reasonable period, within the statute of limitations for fixing the price of the property, provided he notifies the adverse party at the time of such act, on his part; but never to allow him unlimited liberty of selection as to the price of which he will avail himself at the trial of the cause. If he does not make and notify his election of time, then to fix the time by the day of commencing the action, provided the action be commenced within a reasonable time after the conversion. . . . This seems to me the just and equitable rule. It is not, however, perhaps quite the rule which has obtained in the law for settling the question of damages in the case of an illegal conversion of property. . . . I think the rule of damages applicable to cases of this description is reasonably well settled to be as liberal as this in favor of the plaintiff, to-wit: to allow to the plaintiff the highest price for the property prevailing between the time of conversion and a reasonable time afterwards for the commencement of the action. Some of the cases carry the period up to the time of trial of a suit commenced within a reasonable time; and as between these two periods, the time of commencing suit and the time of trial, the rule is somewhat fluctuating. What this reasonable time shall be has never been definitely settled, and may, perhaps, fluctuate to some extent, according to the circumstances of the particular case. . . . For reasons before stated, the limit of time is necessarily to some extent, arbitrary, for the want of available means to determine when the plaintiff would have sold his property, and, by consequence, the damages he has sustained. But it has been supposed, and I think reasonably, that a liberal allowance of time should be made in favor of the plaintiff, and against the defendant, inasmuch as the latter is the defaulting party."

§ 653. **Same Subject.** — But even as to the doctrine of the case last quoted from, the court in another action said: "An unqualified rule, giving a plaintiff in all cases of conversion the highest price to the time of trial, I am persuaded cannot be upheld upon any sound principle of reason or justice. Nor does the qualification suggested in some of the opinion, that the action must be commenced within a reasonable time and prosecuted with reasonable diligence, relieve it of its objectionable character."¹ Still earlier, however, the reasonableness of the rule of the highest intermediate value had been denied. It was said: "It seems to us exceedingly clear that the highest price for which the property could have been sold, at any time after the right of action accrued and before the entry of judgment, cannot,

¹ *Mathews v. Coe*, 49 N. Y. 57.

except in special cases, be justly considered as the measure of damages. Whenever the evidence justifies the conclusion that a higher price would have been obtained by the owner, had he kept the possession, or has been obtained by the wrong-doer, we have admitted and shown that it ought to be included in the estimate of damages; in the first case, as a portion of the indemnity to which the owner is entitled; and, in the second, as a profit which the wrong-doer cannot be permitted to retain; but we cannot admit that the same rule is to be followed where nothing more is shown than a bare possibility that the highest price could have been realized, and still less where it is proved that it would not have been obtained by the owner and has not been obtained by the wrong-doer. Its allowance in these cases would in truth impose a penalty upon the wrong-doer and render the damages vindictive instead of remunerative.”¹ But the rule announced in *Romaine v. Van Allen*, *supra*, was adopted in *Markham v. Jaudon*, 41 N. Y. 235, and in *Lobdell v. Stowell*, 51 N. Y. 70.²

§ 654. **Same Subject.** — The question may be considered to have been settled by the case of *Baker v. Drake*,³ which was an action for the unauthorized sale of railway shares. The court here say: “The most important question in this case is that which relates to the rule of damages. The judge at the trial, following the case of *Markham v. Jaudon*, 41 N. Y. 235, instructed the jury that the plaintiff, if entitled to recover, was entitled to the difference between the amount for which the stock was sold by the defendants, and the highest market value which it reached at any time after such sale down to the day of trial. This rule of damages has been recognized and adopted in several late adjudications in this state in actions for the conversion of property of fluctuating value; but its soundness, as a general rule, applicable to all cases of conversion of such property, has been seriously questioned, and is denied in various adjudications in this and other states.

“This court has, in several instances, intimated a willingness to re-examine the subject, and in *Mathews v. Coe*, 49 N. Y. 57, per Church, C. J., states very distinctly that an unqualified rule, giving a plaintiff in all cases of conversion the benefit of the highest price to the time of trial, could not be upheld upon any sound principle of reason or justice, and that we did not regard the rule referred to so

¹ *Suydam v. Jenkins*, 3 Sandf. 614.

² Also, see: *Kortright v. Bank of Buffalo*, 20 Wend. 91, 22 Wend. 348; *Cortelyou v. Lansing*, 2 Cai. Cas. 200.

³ 53 N. Y. 211, 13 A. R. 507, second appeal, 66 N. Y. 518, 23 A. R. 80.

firmly settled by authority as to be beyond the reach of review, whenever an occasion should render it necessary. . . .

"In a case where the loss of probable profits is claimed as an element of damage, if it be ever allowable to mulct a defendant for such conjectural loss, its amount is a question of fact, and a finding in respect to it should be based upon some evidence. In respect to a dealing, which, at the time of its termination, was as likely to result in further loss as in profit, to lay down as an inflexible rule of law that as damages for its wrongful interruption the largest amount of profits which subsequent developments disclose might, under the most favorable circumstances, have been possibly obtained from it, must be awarded to the fortunate individual who occupies the position of plaintiff, without regard to the probabilities of his realizing such profits, seems to me a wide departure from the elementary principles upon which damages have hitherto been awarded.

"An amount sufficient to indemnify the party injured for the loss, which is the natural, reasonable and proximate result of the wrongful act complained of, and which a proper degree of prudence on the part of complainant would not have averted, is the measure of damages which juries are usually instructed to award, except in cases where punitive damages are allowable. Before referring to the authorities which are supposed to govern the question, I will briefly suggest what would be a proper indemnity to the injured party in a case like the present, and how greatly the rule under consideration exceeds that just limit. The plaintiff did not hold the stocks as an investment, but the object of the transaction was to have the chance of realizing a profit by their sale. He had not paid for them. The defendants had supplied all the capital embarked in the speculation except the comparatively trifling sum which remained in their hands as margin. Assuming that the sale was in violation of the rights of the plaintiff, what was the extent of the injury inflicted upon him? He was deprived of the chance of a subsequent rise in price. But this was accompanied with the corresponding chance of a decline, or, in case of a rise, of his not availing himself of it at the proper moment; a continuance of the speculation also required him to supply further margin, and involved a risk of ultimate loss.

"If, upon becoming informed of the sale, he desired further to prosecute the adventure and take the chances of a future market, he had a right to disaffirm the sale and require the defendants to replace the stock. If they failed or refused to do this, his remedy was to do it himself and charge them with the loss reasonably sustained in doing so. The advance in the market price of the stock from the time of

the sale up to a reasonable time to replace it, after the plaintiff received notice of the sale, would afford a complete indemnity. Suppose the stock, instead of advancing, had declined after the sale, and the plaintiff had replaced it, or had full opportunity to replace it, at a lower price, could it be said that he sustained any damage by the sale; would there be any justice or reason in permitting him to lie by and charge his broker with the result of a rise at some remote subsequent period? If the stocks had been paid for and owned by the plaintiff, different considerations would arise, but it must be borne in mind that we are treating of a speculation carried on with capital of the broker, and not of the customer. If the broker has violated his contract or disposed of the stock without authority, the customer is entitled to recover such damages as would naturally be sustained in restoring himself to the position of which he has been deprived. He certainly has no right to be placed in a better position than he would be in if the wrong had not been done.

“But the rule adopted in *Markham v. Jaudon*, passing far beyond the scope of a reasonable indemnity to the customer whose stocks have been improperly sold, places him in a position incomparably superior to that of which he was deprived. It leaves him, with his venture out for an indefinite period, limited only by what may be deemed a reasonable time to bring a suit and conduct it to its end. The more crowded the calendar, and the more new trials granted in the action, the better for him. He is freed from the trouble of keeping his margin good and relieved of all apprehension of being sold out for want of margin. If the stock should fall or become worthless he can incur no loss, but if, at any period during the months or years occupied in the litigation, the market price of the stock happens to shoot up, though it be but for a moment, he can, at the trial, take a retrospect and seize upon that happy instant as the opportunity for profit of which he was deprived by his transgressing broker, and compel him to replace with solid funds this imaginary loss.”

§ 655. **Same Subject.** — It will be noticed that the doctrine of this case rests, in a large measure, upon the rule of avoidable consequences, that is, the duty is laid upon plaintiff to make the damages as light as he may, by going into the market and replacing the stock within a reasonable time after learning of the conversion. The opinion, however, lays great stress upon the fact that in the transaction the plaintiff was operating upon the capital of his broker, and had invested but little himself, and it was said, “If the stocks had been paid for and owned by the plaintiff, different considerations would arise.” But the court in a later case brushed away this dis-

inction and said: "But the duty of the plaintiff to make the damages as light as he reasonably may, rests upon him in both cases, for there is no more legal wrong done by the defendant in selling the stock, which the plaintiff has fully paid for, than there is in selling the stock which he has agreed to hold on a margin, and which agreement he violates by selling it. All that can be said is that there is a difference in amount, as in one case the plaintiff's margin has gone, while in the other the whole price of the stock has been sacrificed. But there is no such difference in the legal nature of the two transactions as should leave the duty resting upon the plaintiff in the one case to repurchase the stock, and in the other case, should wholly absolve him therefrom."¹ With this extension of the doctrine, the court re-affirms the case of *Baker v. Drake*. And in New York this has since been the recognized rule applied to conversion of stocks, that the measure of damages shall be the highest value between the date of the conversion and a reasonable time thereafter when the plaintiff might by due diligence have replaced the stock in the market. It is not understood that the duty is placed upon the plaintiff to actually re-purchase, but this rule is arrived at as the proper measure under the doctrine of avoidable consequences, that for a certain sum the plaintiff could have placed himself in the same position as before the wrong complained of.²

§ 656. Same Subject; What is Reasonable Time after Conversion. — When these cases speak of a reasonable time after the conversion between which limits the plaintiff is entitled to the highest value, they mean strictly a reasonable time after the plaintiff learns of the conversion.³ The question as to what is a reasonable time is one for the court, if the facts are agreed upon,⁴ but no arbitrary time can be settled upon for all cases, since its length will vary according to the circumstances of the transaction.⁵

§ 657. Same Subject; Rule in Other States. — Without going further into detail in this matter, the New York doctrine as to the measure of damages for the conversion of property of fluctuating value may be said to be approved in the Supreme Court of the United

¹ *Wright v. Bank*, 110 N. Y. 237, 18 N. E. 79, 6 A. S. R. 356, 1 L. R. A. 289.

² *Minor v. Beveridge*, 141 N. Y. 399, 36 N. E. 404, 38 A. S. R. 804; *Ormsby v. Copper Co.*, 56 N. Y. 623; *Gruman v. Smith*, 81 N. Y. 27; *Colt v. Owens*, 90 N. Y. 368; *Harris v. Trobridge*, 83 N. Y. 99, 38 A. R. 398; *Smith v. Savin*, 141 N. Y. 315, 36 N. E. 338; *Griggs v. Day*, 158 N. Y. 1, 52 N. E. 692; *Corn Ex. Bank v. Peabody*, 111 App. Div. 553, 98 N. Y. Supp. 78; *Barber v. Ellingwood*, 137 App. Div. 704, 129 N. Y. Supp. 414.

³ *Smith v. Savin*, *supra*.

⁴ *Wright v. Bank*, *supra*.

⁵ *Burnham v. Lockwood*, 71 App. Div. 301, 75 N. Y. Supp. 828; *Rosenbaum v. Stiebel*, 137 App. Div. 912, 122 N. Y. Supp. 131.

States,¹ in New Jersey,² Oregon,³ Utah,⁴ Indiana,⁵ Iowa, as to stocks, but the general rule applies as to other chattels,⁶ and Massachusetts.⁷ In Wyoming,⁸ Alabama⁹ and South Carolina,¹⁰ the allowance is in the discretion of the jury. In Colorado,¹¹ Illinois,¹² Nevada,¹³ and Washington¹⁴ the rules seem to be that the measure of damages for the conversion of shares of stock is the market value at the time of the conversion, and that the owner is entitled to an additional amount equal to any dividends paid on the converted stocks to the date of his demand for them, together with interest on the entire amount from the conversion to verdict. And it has been held in Missouri,¹⁵ and Minnesota,¹⁶ that the measure of damages, in the absence of proof to the contrary, is the face value of the stock. In California,¹⁷ Oklahoma,¹⁸ Georgia,¹⁹ North Dakota²⁰ and South Dakota,²¹ there are statutes governing the subject. In Pennsylvania the rule is that where the case does not involve an actually wrongful conversion or breach of trust, the value of the stock at the time of the technical conversion, with interest, fixes the damages.²² But the court in one case said: "The rule, however, is not changed but only modified to this extent, that wherever there is a duty or obligation devolved upon a defendant to deliver such stocks or securities at a particular time, and that duty or obligation has not been fulfilled, then the plaintiff is entitled to recover the highest price in the market be-

¹ *Galigher v. Jones*, 129 U. S. 193, 9 Sup. Ct. R. 335, 32 L. Ed. 658; *Douglass v. McAllister*, 3 Cranch 298, 2 L. Ed. 446; *Rivinus v. Langford*, 75 Fed. 959, 21 C. C. A. 581, 33 L. R. A. 250.

² *Dinock v. Bank*, 55 N. J. L. 296, 25 Atl. 926, 39 A. S. R. 643.

³ *Budd v. Railway Co.*, 15 Ore. 413, 15 Pac. 659, 3 A. S. R. 169.

⁴ *Walley v. Bank*, 14 Utah 305, 47 Pac. 147.

⁵ *Citizens Ry. v. Robbins*, 144 Ind. 671, 42 N. E. 916, 43 N. E. 649, 25 A. S. R. 445.

⁶ *Gensbury v. Field & Co.*, 104 Ia. 599, 74 N. W. 3; *Loetscher v. Dillon*, 119 Ia. 202, 93 N. W. 101.

⁷ *Maynard v. Pease*, 99 Mass. 555.

⁸ *Hilliard Co. v. Woods*, 1 Wyo. 396.

⁹ *Boutwell v. Parker*, 124 Ala. 341, 27 So. 309; *Terry v. Bank*, 93 Ala. 599, 9 So. 299, 30 A. S. R. 87.

¹⁰ *Carter v. Du Pre*, 18 S. C. 179.

¹¹ *Grimes v. Barndollar*, 58 Col. 421, 148 Pac. 256.

¹² *Burns v. Shoemaker*, 172 Ill. App. 290.

¹³ *Boylan v. Huguet*, 8 Nev. 345; *Robinson Min. Co. v. Riepe*, 37 Nev. 27, 138 Pac. 910; *Ward v. Carson R. Wood Co.*, 13 Nev. 44.

¹⁴ *Hetrick v. Smith*, 67 Wash. 664, 122 Pac. 363.

¹⁵ *Shewalter v. Wood*, 183 S. W. 1127 (Mo.).

¹⁶ *Hawkins v. Mellis, etc. Co.*, 127 Minn. 393, 149 N. W. 663.

¹⁷ *Myers v. Exploration Co.*, 20 Cal. App. 418; *Lynch v. McGhan*, 7 Cal. App. 132, 93 Pac. 1044; *Potts v. Paxton*, 153 Pac. 957.

¹⁸ *Funk v. Hendricks*, 24 Okla. 837, 105 Pac. 352.

¹⁹ *Barnett v. Thompson*, 37 Ga. 335.

²⁰ *First Nat'l Bank v. Bank*, 9 N. D. 319, 83 N. W. 221.

²¹ *Rosum v. Hodges*, 1 S. D. 308, 47 N. W. 140, 9 L. R. A. 817.

²² *Penn. Ins. Co. v. Ry. Co.*, 153 Pa. St. 160, 25 Atl. 1043, cited in 13 Enc. Ev. 101.

tween that time and the time of the trial. The grounds of this exception are that such securities are limited in quantity, are not always to be obtained at any price, and are of very fluctuating value.”¹

§ 658. **Views of Sedgwick as to Rule where Value Fluctuates.** — Sedgwick,² after an exhaustive discussion of the rule of higher intermediate value, and copious quotations from decisions, sums up his conclusions in the following manner: “We have gone into the subject of higher intermediate value in detail, and with liberal extracts from the cases, because otherwise it is involved in great confusion to which there is no apparent key. Arranged historically, however, the cases illustrate curiously the metamorphosis of the law in freeing itself from the old fetters of formal actions. While the forms of actions lasted, the effort of the courts was to discover a measure of damages suitable for each form. Now, in trover, this was, owing to a number of causes, peculiarly difficult. It was easy to say that the measure of damages was the value at the time of the conversion, with interest, and that a demand and refusal were evidence of the conversion, but this was no sooner done than it became evident that special circumstances must modify the application of the rule in different cases. The conversion by no means necessarily fixed the actual date of the wrong, for the plaintiff might have had no knowledge of it at the time, the value might have fluctuated greatly before demand and refusal; the property might have had a special value; the plaintiff be deprived of the opportunity to replace himself; the thing converted might be returned before trial. In the development of the action, it was natural that the courts should at first attempt to establish some more comprehensive rule of damages which should let in all the special circumstances. The rule of highest intermediate value between conversion and verdict was an attempt of this sort. Under it the greatest possible latitude was given the plaintiff, both as to time and value, and many years were wasted before it was settled that such a rule was entirely in conflict with the elementary principles of compensation. Since then, the courts have worked out the theory of a *higher* intermediate value in certain cases, and numerous cases have been found where the plaintiff must be allowed to prove special or consequential damages. At the end we reach what may be called the only general modern rule, the value of the property or property right lost, with interest; increased by special circumstances within the limits fixed by the rules governing consequential damages, and limited by the rule of avoidable conse-

¹ *White v. Kelley*, 69 Pa. St. 403.

² *Damages*, Vol. 2, § 525.

quences. And this, obviously, must have been the modern principle, had the action of trover never been heard of."

§ 659. **Property Without Market Value.** — It does not follow that because goods and chattels have no market value they may not be recovered for against one who has converted them. The market price in the ordinary sense is generally, but not always, the test of value. For such a tort as the conversion of goods the plaintiff may be entitled to recover large damages, though unable to sell the goods at any price. He may be greatly injured by the loss of goods which he could not sell, but which would be productive of great benefit and therefore would be of great value without a sale.¹ The absence of a market value of the chattel in question, renders it necessary to resort to such other evidence as may be available in order to determine its true value. Ordinarily this may be arrived at by considering its cost and its condition at the time of conversion, together with its character and its use to the owner. Yet the courts have not assumed to define definitely the test that shall be applied in all cases for the conversion of property of this character. This would be impracticable in view of the variant circumstances of the cases. As was said in an early case,² "In most cases the market value of the property is the best criterion of its value to the owner, but in some its value to the owner may greatly exceed the sum that any purchaser would be willing to pay. The value to the owner may be enhanced by personal or family considerations, as in the case of family pictures, plate, etc., and we do not doubt that the '*pretium affectionis*,' instead of the market price, ought then to be considered by the jury or court, in estimating the value. In these cases, however, it is evident that no fixed rule to govern the estimate of value can be laid down, but it must, of necessity, be left to the sound discretion of a jury in the exercise of a reasonable sympathy with the feelings of the owner." The matter has been more tersely put as follows: "When property has a peculiar value to the owner, such as it has to no other person, or when it cannot be exactly replaced by other goods of like kind, the actual value to the owner, and not the market value, is the measure of compensation."³

§ 660. **Same Subject; Damages Measured by Actual Value.** — These questions of value have frequently arisen regarding such articles as household goods, family portraits and other personal be-

¹ Hovey v. Grant, 52 N. H. 569.

² Suydam v. Jenkins, 3 Sandf. 621.

³ Hale on Damages, p. 182, § 76; Bateman v. Ryder, 106 Tenn. 712, 64 S. W. 48, 82 A. S. R. 910; Vaughn v. Wright, 139 Ga. 736, 78 S. E. 123; Ann. Cas. 1914 B 821, and note.

longings. In a case involving a portrait the trial court was asked to instruct the jury that the plaintiff could recover only its fair market value. In sustaining the refusal of the court to so instruct, it was said on appeal: "The general rule of damages in trover, and in contract for not delivering goods, undoubtedly is the fair market value of the goods. But this rule does not apply when the article sued for is not marketable property. To instruct a jury that the measure of damages for the conversion or loss of a family portrait is its market value is merely delusive. It cannot with any propriety be said to have any market value. The first rule of damages is the actual value to him who owns it, taking into account its cost, the practicability and expense of replacing it, and such other considerations as in the particular case affect its value to the owner."¹ In another case which involved the conversion of furniture and household goods, plaintiff testified that most of the articles, though they had been used, were as good as new to her, and she would be required to pay the first cost price to replace them with others as good. The value of such articles converted, for the purpose of determining the damages plaintiff was entitled to recover, was not to be fixed by what others would have been willing to pay for such articles after the conversion and handling thereof by any defendants, but by what they were worth to plaintiff for the uses and purposes for which she had them.² And as to such goods it has been said: "As to certain other goods, such as wearing apparel in use, and certain articles of household goods and furniture kept for personal use and not for sale, while they have a real intrinsic value to the owner, they have little or no market value at the point of destination; they are not shipped as marketable goods. The market value of many such articles depends on style and fashion, irrespective of actual value for use. In some cases the owner may not be able to replace them in any market. In such cases the value is to be properly fixed by considerations of cost and of actual worth at the time of the loss, without reference to what they could be sold for in a particular market or hawked off for by a secondhand dealer where they happen to be unloaded."³ The same principles apply where similar questions are involved in actions for conversion.⁴

¹ *Green v. B. & L. Ry. Co.*, 128 Mass. 221, 35 A. R. 370, citing *Stickney v. Allen*, 10 Gray 352.

² *Pennington v. Storage Co.*, 34 Utah 223, 97 Pac. 115; *Mathews v. Livingston*, 86 Conn. 263, 85 Atl. 529, Ann. Ca. 1914A. 195.

³ *Denver, etc. Ry. Co. v. Frawe*, 6 Col. 385.

⁴ *Gensburg v. Field*, 104 Ia. 599, 74 N. W. 3; *Barker v. Storage Co.*, 79 Conn. 342, 65 Atl. 143; *Hammond v. Darlington*, 109 Mo. App. 333, 84 S. W. 446; *Sell v. Ward*, 81 Ill. App. 675; *Clare v. Johnson*, 19 Ky. L. R. 810, 42 S. W. 101.

5. VALUE ENHANCED BY WRONG-DOER

§ 661. **General Principles.** — Courts and text-writers have found much difficulty in ascertaining and applying the proper rule in determining the amount of damages that should be awarded the owner of a chattel which has been converted and its value thereafter increased by the expenditure of money or labor by the wrong-doer. In fact the subject has been and still is one of controversy and a diversity of views thereon exists among the authorities. As preliminary to further discussion of the question it may be said that in general there are three rules governing the measure of recovery in such cases each of which has been applied in different jurisdictions: First, the owner is entitled to recover the value as enhanced by the labor or money of the wrong-doer; second, he is limited to the value of the property as it was at the time it was converted; and, third, the amount of his recovery will depend upon the *animus* of the wrong-doer, that is, upon the question whether the defendant acted in good faith and under a mistaken belief as to his rights, or whether his wrong was intentional and committed in the spirit of total disregard of the rights of the plaintiff. The first of these is based upon the theory that the wrong-doer, being neither the owner nor entitled to the possession of the property, would be compelled to surrender the property itself in its improved state at the suit of the owner and, therefore, by analogy he should be required to respond to a demand for its equivalent in money; the second, upon the general principle that the plaintiff is to receive actual compensation for the injury inflicted upon him; and the third, upon the doctrine that an innocent party should not be compelled to suffer on account of his mistake and that a willful and intentional wrong-doer should be punished to the extent of losing the labor or money expended by him upon the property after its conversion.

§ 662. **Recovery of Enhanced Value.** — There seem to be but few states in which the rule prevails that a plaintiff is entitled to recover the value of converted chattels as enhanced by the defendant, without regard to the *bona fides* of the latter. Some of the early New York cases announced this doctrine.¹ Thus, the owner of logs tortiously taken and converted into lumber was held entitled to recover the value of the lumber, the court saying: "That the party whose property has been tortiously taken is entitled to the enhanced value until it has been so changed as to alter the title, is a doctrine,

¹ *Betts v. Lee*, 5 Johns. 348, 4 A. D. 368; *Curtis v. Groat*, 6 Johns. 168, 5 A. D. 204; *Babcock v. Gill*, 10 Johns. 287; *Brown v. Sax*, 7 Cow. 95.

as old as the year books.”¹ And the Illinois court has included in the damages all enhancement in the value of the property prior to the time suit is filed.² The Indiana decisions are about the same. Thus, it was held in an action to recover for the conversion of wheat, that the defendant could not prove the value of his own labor in harvesting and threshing the wheat, for the purpose of reducing the damages.³ It was then said: “A wrongful taking and a demand and refusal are each held in trover to be, not a conversion, but merely sufficient evidence of it. And yet nothing can be clearer than that these things do not change the title to the property; it still remains in the plaintiff, and may, by action of replevin, be recovered in specie, so long as its identity is perceptible to the senses. . . . It may in the new form be replevied, because it is, in that form, still the property of the plaintiff, and the defendant is not entitled to compensation for the labor bestowed upon it, for that was his own folly, and indeed he was a wrong-doer in the very act of adding such value to the property of another.”

§ 663. *Same Subject.* — In this same vein, the Maine court has said relative to the conversion of lumber sawed into spool stock: “The plaintiff might have brought replevin for the same, and thereby have acquired the benefit of whatever labor had been bestowed upon it. Thus cloth made into a garment, leather into shoes, trees squared into timber, and iron converted into bars may be reclaimed by the original owner in their improved condition. The law neither divests him of his property nor requires him to pay for improvements made without his authority. It is only when the identity of the original material has been destroyed, or its value insignificant when compared with the article manufactured from it, that the law is otherwise. To say that the owner may retake the property in an action of replevin in an improved state, as all the authorities hold, and yet that he may not, when he sees fit to resort to an action of trover, recover the equivalent in damages, is a subtlety too refined to be adopted in the ordinary affairs of business transactions, and, as said by Strout, J., in *Powers v. Tilley*, 87 Me. 34, 47 A. S. R. 304, would relieve trespassers from all loss, and would tend to encourage wrong-doing.”⁴ The Massachusetts court assented to this doctrine,⁵

¹ *Baker v. Wheeler*, 8 Wend. 505, 24 A. D. 66.

² *Robertson v. Jones*, 71 Ill. 405; Ill. etc. Ry. Co. v. *Ogle*, 82 Ill. 627, 25 A. R. 342.

³ *Ellis v. Wire*, 33 Ind. 127, 5 A. R. 189.

⁴ *Wing v. Milliken*, 91 Me. 387, 40 Atl. 138, 64 A. S. R. 238; *Cushing v. Longfellow*, 26 Me. 306; *Moody v. Whitney*, 38 Me. 174, 61 A. D. 239.

⁵ *Stockbridge Iron Co. v. Iron Works*, 102 Mass. 80.

as did that of Wisconsin¹ till the rule in the latter state was changed by statute.² This doctrine has seemingly been applied in cases where a careful examination will show that the general rule of the value of the property at the time of the conversion has in fact been the one adhered to. The determining point is as to the actual time of the conversion. Thus, it has been held that where logs were wrongfully taken and later made into lumber the owner had the right to regard the conversion as having taken place when the logs were sawed into lumber, and to recover their value at that time.³ And where plaintiff's wood had been made into charcoal, it was held that he could recover the value of the latter.⁴

§ 664. **Recovery of Value at Time of Conversion less Cost of Improvements.** — In a case in the Wisconsin court⁵ from the decision of which resulted the statute in that state above referred to, the position was taken that one who knowingly and willfully takes another's property without the owner's consent may change it into whatever form he may please or make such additions as he desires for his own profit, without further liability than for the value of the property when taken. Of this case it was remarked by one court: "This case we consider at variance not only with every adjudication on the point, but with principle, for the wrong-doer cannot be permitted to retain a part of the value only on the ground that he has a property in the chattel, to the extent of that part of the value that he is allowed to retain."⁶ Somewhat at variance with the apparent leanings of the decisions from Maine, cited in the preceding section, the case of *Moody v. Whitney*, 38 Me. 174, 61 A. D. 239, announced that where timber had been cut and hauled away the damage should be confined to its value at the time of its severance from the freehold if the possession of the converter subsequent to that time had been uninterrupted. Here the court said: "A strong analogy exists between an article wrongfully converted, and afterward changed into an improved state without losing its identity, and goods fraudulently mingled with other goods; in which case, if the mixture is indistinguishable, and a new ingredient is formed, not capable of a

¹ *Weymouth v. Ry. Co.*, 17 Wis. 567, 84 A. D. 763, where it was said, however, that to the usual damages should be added any value increased by any cause *other* than the act of the defendant.

² *Webster v. Moe*, 35 Wis. 75.

³ *Final v. Backus*, 18 Mich. 232; *Grant v. Smith*, 26 Mich. 201.

⁴ *Riddle v. Driver*, 12 Ala. 590; see *Bly v. United States*, 4 Dill. C. C. 464; *Nesbit v. St. Paul Lumber Co.*, 21 Minn. 491; *Heard v. James*, 49 Miss. 236; *Stuart v. Phelps*, 39 Ia. 14.

⁵ *Single v. Schneider*, 30 Wis. 570.

⁶ *Nesbit v. St. Paul Lumber Co.*, 21 Minn. 491.

just appreciation and division, according to the original rights of each, then the party who occasions the wrongful mixture must bear the whole loss. But if the party who would be entitled to the whole of the mixture makes no attempt to obtain the whole, but resorts to his action of trover, the damages would be, not the value of all that which he might rightfully take, but only of that which was first wrongfully converted by the act of intermingling."

§ 665. *Same Subject.* — In a case already cited¹ the court took occasion to say relative to the theory of some courts that because an owner could by replevin re-acquire the property in its improved state he could likewise recover its value as thus improved: "In determining the question of recapture, the law must either allow the owner to retake the property, or it must hold that he has lost his right by the wrongful act of another. If taken at all, it must be taken as it is found, though enhanced in value by the trespasser. It cannot be resorted to its original condition. The law, therefore being obliged to say either that the wrong-doer shall lose his labor, or the owner lose the right to take his property wherever he may find it, very properly decides in favor of the latter. But where the owner voluntarily waives the right to reclaim the property itself, and sues for the damages, the difficulty of separating the enhanced value from the original value no longer exists. It is then entirely practicable to give the owner the entire value that was taken from him, which certainly seems to be all that natural justice requires, without adding to it such additional value as the property may have afterwards acquired from the labor of the defendant. In the case of recaption, the law does not allow it because it is absolute justice that the owner should have the additional value, but because the wrong-doer has by his own act created a state of facts where either he or the owner must lose something. There the law says the wrong-doer shall lose. But if the owner chooses to resort to another remedy, in applying which the law may give him full compensation for all that he has lost, without compelling the wrong-doer to pay more, I see no reason why that should not be the rule. The value of the property at the moment of conversion, with such increase as it may have received from fluctuations of the market, or other causes independent of the acts of the defendant, should be the measure of damages. If there is any force in these considerations, those cases which have assumed that the measure of damages should in all such instances include the enhanced value of the property, merely because the owner might have retaken it, ought not to be followed." The same question was

¹ *Weymouth v. Ry. Co.*, 17 Wis. 567, 84 A. D. 763.

in a similar way reviewed by the Nevada court¹ in an action for damages for ore unintentionally mined by defendant from plaintiff's mine. After a painstaking discussion of the authorities, the court held the measure of damages to be the value of the ore, deducting defendant's necessary cost of mining it, and concluded its opinion as follows: "A careful examination of the authorities has convinced us that there is a growing inclination among all courts, where it can be done, to apply the only safe and just rule in actions for damages, whether *ex contractu* or *ex delicto*, and that is, to give the injured party as near compensation as the imperfection of human tribunals will permit."

§ 666. Recovery Affected by Mistake or Bad Faith of Defendant.

— In considering the third rule stated in § 661, *supra*, it will be found that hereunder is announced the doctrine now adhered to by nearly all of the authorities, and the one that sound reason dictates should be applied. The weight of authority is in favor of the rule which gives compensation for the loss, that is, the value of the property at the time and place of conversion, with interest after, allowing nothing for value subsequently added by the defendant, when the conversion does not proceed from willful trespass, but from the wrong-doer's mistake, or from his honest belief of ownership in the property, and there are no circumstances showing a special and peculiar value to the owner, or a contemplated special use of the property by him. In cases of conversion by willful act or by fraud, the value added by the wrong-doer after conversion is sometimes given as exemplary or vindictive damages; or because the defendant is precluded from showing an increase in value by his own wrong, and from claiming a corresponding reduction of damages.² Not only does the fundamental principle measuring the damages to be recovered for a conversion in general sanction this doctrine, but there are certain abstract reasons requiring it. In an action for the conversion, the plaintiff sues for compensation for the property which he has lost. That must necessarily be in the condition it was at the moment of conversion. To permit him to recover the value of that which the defendant has made from the property plaintiff lost would be to give him judgment for something different from that which he is permitted

¹ *Waters v. Stevenson*, 13 Nev. 157, 29 A. R. 293.

² *Beede v. Lamprey*, 64 N. H. 510, 15 Atl. 133, 10 A. S. R. 427, citing among others the following cases: *Herdie v. Young*, 55 Pa. St. 176, 93 A. D. 739; *Wooley v. Carter*, 7 N. J. L. 85, 11 A. D. 520; *Franklin Coal Co. v. McMillan*, 49 Md. 549, 33 A. R. 280; *Barton Coal Co. v. Cox*, 39 Md. 1, 17 A. R. 525; *Bennett v. Thompson*, 13 Ired. 146; *Railway Co. v. Hutchins*, 32 Ohio St. 571, 30 A. R. 629; *Ward v. Carson River Wood Co.*, 13 Nev. 44; *Goller v. Fett*, 30 Cal. 481; *Gray v. Parker*, 38 Mo. 160; *Cooley*, Torts, 457, 458, note.

to sue for. Furthermore, the result of the judgment for the conversion is that the property converted changes ownership, and the defendant's title relates back to the date of the conversion as if plaintiff had at that time sold the property to him and had sued him for its reasonable or market price, which, of course, would be assessed as of such time. Where anything more is given, it is professedly by those courts giving it solely as a punishment to the wrong-doer and not because the owner is, either in fact or in law, entitled to it.

§ 667. **Conversion of Coal or Ore.** — Courts have frequently been called upon to apply these principles in cases where coal or ore had been converted. And I have found some little disagreement among them as to the exact application of the rule. In one case where defendant had through mistake mined and carried away coal from the land of plaintiff, the court said: "Where there is no wrongful purpose or wrongful negligence in the defendant, compensation for the real injury done is the purpose of all remedies; and so long as we bear this in mind, we shall have but little difficulty in managing the forms of action so as to secure a fair result. If the defendant, in this case, was guilty of no intentional wrong, he ought not to have been charged with the value of the coal after he had been at the expense of mining it; but only with its value in place, and with such other damage to the land as his mining may have caused."¹ It has been held, however, that the measure of damages in such cases is the value of the coal at the pit's mouth, less the cost of transportation, but with no deduction for the expense of mining.² So, where gold-bearing earth had been mistakenly removed, the damages were held to be the value of the gold less the cost of digging and separation.³ And in another case it appeared that petroleum arose in certain salt wells leased by plaintiff to defendant, and the latter separated the petroleum from the salt and converted it to his own use. The defendant was held entitled to an allowance of his expense in getting the petroleum, but the real measure of damages in the case was said to be the value of the petroleum at the moment of its separation from the land, without any deduction, since defendant's labor and expense were incurred in obtaining the salt.⁴ In another case for the conversion of ore, the court said that the measure of damages should

¹ *Forsyth v. Wells*, 41 Pa. St. 291, 80 A. D. 617; *Morrison v. Robinson*, 31 Pa. St. 456; *Coal Creek M. & M. Co. v. Moses*, 15 Lea 300, 54 A. R. 415; *Ross v. Scott*, 15 Lea 479.

² *Robertson v. Jones*, 71 Ill. 405; *Ill. etc. Ry. Co. v. Ogle*, 82 Ill. 627, 25 A. R. 342; *Barton Coal Co. v. Cox*, 39 Md. 1, 17 A. R. 525; *Blaen Avon Coal Co. v. McCulloh*, 59 Md. 403, 43 A. R. 560.

³ *Goller v. Fett*, 30 Cal. 481; see *Maye v. Yappen*, 23 Col. 306.

⁴ *Kier v. Patterson*, 41 Pa. St. 357.

have been the value of the ore sold, as shown, less the reasonable and proper cost of raising it from the mine after it was broken, and hauling it from the mine to the defendant's place of business.¹

§ 668. **Same Subject; Conversion of Timber.** — The question of the proper measure of damages for the conversion of property the value of which has been enhanced by the labor or money of the wrong-doer has arisen more frequently concerning the conversion of timber than perhaps any other species of property. The defendant's good faith has apparently been the determining feature. It has been said that where defendant was not a willful trespasser in going upon plaintiff's land and cutting and carrying away timber, the measure of damages to be recovered against him should be limited to the value of the timber while standing uncut upon the land.² But even upon this the courts are apparently out of harmony. Thus, the Maine court has said that where timber is cut by a wrong-doer and subsequently carried away, the owner is not restricted in his damages to the value of the timber before it was cut, but may, in an action of trover, recover its value at the time and in the condition in which it was carried away.³ Another court has expressed the rule as being the value of the trees at the place where and immediately after they were severed, adding nothing for increased value given to them by subsequent acts of the defendant, such as turning them and hauling them to his mill. By way of argument in support of this standard, it was said: "The defendant converted the logs by cutting and severing the trees from the land, and the conversion being complete by that wrongful act, their value there represents the plaintiff's loss. His loss is no greater by reason of the value added by the labor of cutting and transportation to the mill. It does not appear that the logs were of special or exceptional value to the plaintiff upon the land from which they were taken, nor that he had a special use for them other than by obtaining their value by a sale, nor that the market price had risen after their conversion. If, in estimating the damages, the value at the mill increased by the cost of cutting and transportation is to be taken as the criterion, the plaintiff will receive more than compensation for his loss. With such a rule of damages, if, besides the defendant, another trespasser had cut logs of an equal amount upon the same lot, and had hauled them to the lake shore, and a third had simply cut and severed the trees from the land and sold them there, and suits

¹ *Omaha & Grant S. & R. Co. v. Tabor*, 13 Col. 41, 21 Pac. 925, 16 A. S. R. 185.

² *Hoxsie v. Empire Lumber Co.*, 41 Minn. 548; *King v. Merriman*, 38 Minn. 47.

³ *Wing v. Milliken*, 91 Me. 387, 40 Atl. 138, 64 A. S. R. 238.

for their conversion had been brought against each one, the sums recovered would differ by the cost of transporting the logs to the place of the alleged conversion, while the loss to the plaintiff would be the same in each of the three cases. The injustice of such an application of the rule of damages is apparent from the unequal results.”¹

§ 669. **Same Subject.** — This reasoning was carried further by the Michigan court,² which may be said to have presented the entire logic upon which this rule is based. The action was trover for logs cut by mistake by the defendants from the plaintiff's land and shipped to a city in another state. The court held the measure of damages to be either the value of the logs where they were cut, with the profits which might have been derived from them in the market, or their market value at their destination deducting cost of transportation. The court said among other things: “Passing for the present the adjudged cases, I can see no good reason or principle why the measure of damages in actions of trover should be different from that in other actions sounding in tort; and to hold that there is such a distinction is to permit the form of action rather than the actual injury complained of to fix the damages. This would be giving the form of action a prominence and controlling influence to which it is in no way entitled, and would be permitting the plaintiff, by adoption of a particular remedy, to increase the damages at pleasure, and that to an extent which would far more than compensate him for the injury which he sustained, and would also be a positive wrong to the defendants. Such a doctrine, if carried out to its logical conclusion and applied to many cases which may arise, would be to allow the plaintiff damages so far in excess of the injury he sustained as to cause us to doubt the wisdom of any rule which would thus sanction a greater wrong in an attempt to redress a lesser. . . . Then, again, there is no uniformity in such a rule. One man cuts timber, but does not remove it; another cuts and removes it a short distance, adding but little to its original value; while another cuts and removes it a long distance, increasing its value thereby an hundred-fold. Separate actions are brought against each, the plaintiff in each case claiming to recover the value at the place to which the timber was taken. Now, it is very evident that although the value of the standing timber in each case was the same, and the actual injury to the plaintiff in each case the same, the verdicts would be very different; and the party who had in good faith done the most, and spent the most money in giving the timber any

¹ *Beede v. Lamprey*, 64 N. H. 510, 15 Atl. 133, 10 A. S. R. 426.

² *Winchester v. Craig*, 33 Mich. 205.

real value, would be punished the greatest. In fact, by increasing its value he would be but increasing to a corresponding amount what he would have to pay by way of damages. In other words, such a defendant, by his labor and the means which he expended in bringing the property to market, has given it nearly all the value it possesses ; and when he is sued and responds in damages to the amount of such increased value, he has then paid just twice the actual market value of the property in its improved condition, less the value of the original timber standing, once in giving it its value, and then paying for it in damages according to the very value which he gave it. . . .

“It is sometimes said that the effect of the view which we have taken would be to compel a party to sell and dispose of property which he desired to retain as an investment at what he might consider an inadequate price, and at a time when he would not have sold it. This may be true, yet it is no more than what happens daily, and that under circumstances much more aggravating. Take the case of a willful trespasser : He cuts the timber of another into cord-wood and burns it ; or he takes his grain and feeds it ; or cattle which the owner prizes very highly and butchers them. In all these cases the owner has lost his property, and the law cannot restore it ; the law cannot do complete justice ; it cannot fully and completely protect and guard the feelings and rights of others ; it can but approximate to it ; and because the owner in this way may be compelled to part with his property, and thus a wrong be done him, it would not improve matters to inflict a much greater wrong upon another equally entitled to protection, in order that the first sufferer might be unduly recompensed thereby. The law rather aims, so far as possible, to protect the plaintiff, but at the same time it has a due regard to the rights of the defendants, and it will not inflict an undue or an unjust punishment upon them, in cases where they are not deserving it, as a means of righting an injury, especially where it would much more than compensate the owner for the injury which he sustained.

“In this case each has an interest in the logs ; the plaintiff as assignee of the original owner, the defendant by, in good faith, largely increasing their value. Each should be protected in his rights, and thus, as nearly as possible, substantial justice be done. To allow the plaintiff to recover what he here seeks would be to break down all distinction between the willful and involuntary trespasser ; a distinction which is based upon sound legal principles, and which is applied in all other forms of action.”

§ 670. **Same Subject ; Where Wrong Willful.** — It will thus be seen that this doctrine applies only where there was an absence of

bad faith on the part of the defendant.¹ If such bad faith existed, the rule is different. It was said by the Supreme Court of the United States that in an action of trover for timber cut and carried away, if the defendant is a knowing and willful wrong-doer, he will be held in damages for the value of the property when the owner demands it which, of course, carries with it any increase in value by reason of the expenditure of time or money by the defendant.² As has already been said, however, the only reason for allowing a greater recovery than the value of the property at the time of the conversion is to inflict punishment upon the wrong-doer and thus discourage wrongdoing, bearing in mind the fact that as a matter of absolute right the owner is not entitled to the increased value. It was said in one of the cases above cited³ that in the redress of private injuries the law aims not so much to punish the wrong-doer as to compensate the sufferer for his injuries; and the cases in which it goes farther and inflicts punitive or vindictive penalties are those in which the wrong-doer has committed the wrong recklessly, willfully or maliciously, and under circumstances presenting elements of aggravation. Such doctrine is, in fact, a wide departure from the general underlying principles regulating the recovery of damages which are based upon the theory that it is the plaintiff's loss that is to be considered and not the loss or gain of the defendant. But the doctrine seems to be well grounded in authority.⁴

§ 671. **Actions Against Purchaser from Wrong-doer.** — There is a tendency among the authorities to measure the damages to be recovered against a purchaser from the converter of chattels by the liability of the converter himself. The standard of such recovery will therefore depend upon the good or bad faith of him who originally took the chattels. So it was said in one case that where purchasers,

¹ *Wetherbee v. Green*, 22 Mich. 311, 7 A. R. 653; *Ayres v. Hubbard*, 57 Mich. 322, 23 N. W. 829, 58 A. R. 361; *Gates v. Rifle Boom Co.*, 70 Mich. 316, 38 N. W. 245; *Moody v. Whitney*, 38 Me. 174, 61 A. D. 239; *Skinner v. Pinney*, 19 Fla. 48, 45 A. R. 1; *Ward v. Carson R. Wood Co.*, 13 Nev. 44; *White v. Yawkey*, 108 Ala. 270, 19 So. 360, 54 A. S. R. 159, 32 L. R. A. 199; *Railway Co. v. Hutchins*, 32 Ohio St. 571, 30 A. R. 629; *Tilden v. Johnson*, 52 Vt. 628, 36 A. R. 769; *Cox v. England*, 65 Pa. 212.

² *Bolles W. W. Co. v. U. S.*, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230; *United States v. Williams*, 18 Fed. 475.

³ *Wetherbee v. Green*, 22 Mich. 311, 7 A. R. 653.

⁴ *Stuart v. Phelps*, 39 Ia. 14; *Underwood v. Paine Lumber Co.*, 79 Wis. 592, 48 N. W. 673; *Moret v. Mason*, 106 Mich. 340, 64 N. W. 193; *Rice v. Hollenbeck*, 19 Barb. 664; *Ayres v. Hobbs*, 41 Ind. App. 576, 84 N. E. 554; *Heard v. James*, 49 Miss. 236. In the last case cited, trees had been cut down on plaintiff's land and made into staves. The plaintiff, in an action for the conversion, was given judgment for the value of the staves with no allowance to the defendants for their labor in working up the timber, the court basing the judgment upon the ground that "the conduct of the defendant was willful, utterly regardless of the rights of the plaintiff"; *Field on Damages*, § 818.

innocent of wrong-doing, from an inadvertent trespasser, have by the expenditure of time, labor and money, enhanced the value of the property converted and are sued for its conversion, the measure of damages is the injury done to the plaintiff by the original conversion, and not the value of the property thus enhanced by the defendant's acts or those of their vendor.¹ But the court holds that such is not the rule where the trespass is willful or in bad faith. Such a case came before the Maine court for decision and it was there said that the owner of trees cut from his land by a willful trespasser, and by him manufactured into railroad ties, and sold to an innocent purchaser, is entitled to recover from the latter the value of the property at the time of the purchase without any deduction for the increased value put upon it by the labor of the trespasser.² And upon similar facts, where it appeared that the defendant's vendor was a willful trespasser, the measure of damages was held to be the value of the timber at the time and place it was delivered to the defendant, rather than at the place it was situated at the time the contract of sale was entered into.³ It is further held that if, at the time of the purchase by defendant, he had notice of the rights of the owner, or the circumstances were sufficient to put him on inquiry, he will be liable for the value of the property at the time plaintiff demanded it of him.⁴

§ 672. **Value of Use of Converted Property.** — It has frequently been mentioned in these pages that ordinarily the result of the recovery of judgment by plaintiff in trover is to transfer the property to the defendant, the title relating back to the time of the conversion, much as if a sale had then been made to the defendant. The general rule giving the plaintiff as damages the value of the property at the date of conversion with interest therefrom necessarily renders imperative another rule to the effect that the plaintiff is not entitled to recover as an item of his damages anything for the use of the property intermediate the conversion and the trial. This is the general

¹ *White v. Yawkey*, 108 Ala. 270, 19 So. 360, 54 A. S. R. 159, 32 L. R. A. 199; *Tuttle v. White*, 46 Mich. 485, 41 A. R. 175; *Isle Royal Min. Co. v. Hertin*, 37 Mich. 332, 26 A. R. 520; *Railway Co. v. Jones*, 34 Tex. Civ. App. 94, 77 S. W. 955; *Birmingham, etc. Co. v. Coal Co.*, 127 Ala. 137, 28 So. 679.

² *Powers v. Tilley*, 87 Me. 34, 32 Atl. 714, 47 A. S. R. 305. A contrary doctrine was announced in the case of *Railway Company v. Hutchins*, 32 Ohio St. 571, 30 A. R. 629, but such doctrine was justly criticised in the case of *Strubee v. Trustees*, 78 Ky. 481, 39 A. R. 251; which, though actions in replevin, involved the same questions as if trover had been brought.

³ *Hoxsie v. Empire Lumber Co.*, 41 Minn. 548, 43 N. W. 476. See *Godwin v. Taenzer*, 122 Tenn. 101, 119 S. W. 1133; *Parker v. Waycross & F. R. Co.*, 81 Ga. 387. The Supreme Court of the United States has held the same: *Woodenware Co. v. United States*, 106 U. S. 432, 27 L. Ed. 230, 1 Sup. Ct. 398.

⁴ *Hastay v. Bonness*, 84 Minn. 120, 86 N. W. 896.

doctrine of the courts, except in those cases where the property has been returned to and accepted by the plaintiff, which matter will be discussed in a subsequent section.¹ One case presenting an apparent exception to this was where a lessor of a chattel wrongfully interfered with its use by the lessee, and in an action by the latter his damages were estimated upon the value of the use of the chattel during the unexpired term.² But in fact this was only an application of the rule permitting the owner of a qualified interest in a chattel to recover to the extent of his interest. The theory of the law is that interest allowed on the value of the property from the date of the conversion compensates the owner for the use of the property for which he is not permitted to recover except under special circumstances,³ or as more technically said, it compensates him for the use of the money representing the value of the property.

6. INTEREST

§ 673. **Why Interest Allowed from Time of Conversion.** — Where property is destroyed, or is converted so that the title either is, or is regarded as, out of the former owner, damages are the pecuniary representative of the property, and take its place. The plaintiff has lost or abandoned his claim to the property; his claim against the defendant is for an equivalent sum of *money*. In this point of view, a conversion very nearly resembles a sale. In this case compensation for being kept from what rightfully belongs to the plaintiff is not compensation for being kept out of the use of property (the value of its use), but for being kept out of the use of money (interest). In an action of trover, therefore, the plaintiff recovers the value of the property, with interest from the time of conversion.⁴ This is the accepted formula unless some statutory provision exist.⁵ It has been held, however, that to entitle the plaintiff to recover such interest it

¹ *Ford v. Roberts*, 14 Col. 291, 23 Pac. 322; *Cutler v. James Gould Co.*, 43 Hun 516; *Lazarus v. Ely*, 45 Conn. 504.

² *Hickok v. Buck*, 22 Vt. 149.

³ *Dalton v. Landahn*, 27 Mich. 529; *Pridgin v. Strickland*, 8 Tex. 427, 58 A. D. 124, another apparent exception; *Texarkana Water Co. v. Kizer* (Tex. Civ. App.) 63 S. W. 913.

⁴ *Sedgwick, Damages*, Vol. 1, § 317.

⁵ *Allen v. Kinyon*, 41 Mich. 281, 1 N. W. 863; *Houghton v. Puryear*, 10 Tex. Civ. App. 383, 30 S. W. 583; *Lack v. Brecht*, 166 Mo. 242, 65 S. W. 976; *Kavanaugh v. Taylor*, 2 Ind. App. 502, 28 N. E. 553; *Lynch v. McGham*, 7 Cal. App. 132, 93 Pac. 1044; *Merchant's Nat'l Bank v. Williams*, 110 Md. 334, 72 Atl. 1114; *Schwitters v. Springer*, 236 Ill. 271, 86 N. E. 102; *Greenfield Bank v. Leavitt*, 17 Pick. 1, 28 A. D. 268; *Crumb v. Oaks*, 38 Vt. 566; *Winstead v. Hicks*, 135 Ky. 154, 121 S. W. 1018, 135 A. S. R. 446; *Bradley v. Harden*, 73 Ala. 70; *Woodworth v. Garstline*, 30 Col. 186, 69 Pac. 705, 58 L. R. A. 417; *Cecil v. Clark*, 49 W. Va. 459, 39 S. E. 202.

must be prayed for in the complaint.¹ But it would seem that this is hardly true where the matter of giving interest is in the discretion of the jury as it is in some states,² or where there is a statute providing for the allowance of interest.³

§ 674. **From what Time Interest Computed.** — The general rule is that the date of the conversion fixes the time from which interest is to be computed in an action of trover. So, where money has been converted interest runs from the date of the wrongful appropriation.⁴ Thus in a Maryland case the cashier of a bank had misappropriated the funds of the bank, and in an action therefor against the sureties on his bond, the court said: "Generally speaking, the rule is that interest should be left to the discretion of the jury; but this rule is not without exceptions, and among its exceptions are cases on bonds or contracts to pay money on a day certain, and cases where the money has been used. Ridgway improperly and unlawfully took and applied to his own use the money of the bank, and his obvious duty is to put the bank in the precise position it would have occupied had the money not been taken and retained by him. As between him and the bank, the duty on his part to pay interest on each sum he embezzled from the time of embezzlement was as positive as the duty to repay the money itself. The whole sum and interest on each item make up the true measure of damages against him for wrongfully taking and detaining or using the money of the bank."⁵ Some objection has been made to the allowance of interest from the time of conversion on account of the fact that prior to judgment the amount of the damages is unliquidated. But to satisfy such objection, some courts have made the somewhat technical explanation, that it is allowed, not strictly as interest, but as a part of the damage itself.⁶ Thus, in an Oregon case for the conversion of shares of stock in a corporation, on the question of allowance of interest the court said: "It is true, interest is not recoverable as such on an unliquidated claim until the amount thereof is ascertained."⁷ But in an action of trover it is allowed on the value of the article converted, not as interest, but as an item of damages, and the owner of

¹ *Texarkana Water Co. v. Kizer*, 63 S. W. 913 (Tex. Civ. App.); *Morris v. Smith*, 51 Tex. Civ. App. 357, 112 S. W. 130.

² *Lance v. Butler*, 135 N. C. 419, 47 S. E. 488; *Kamerick v. Castleman*, 29 Mo. App. 658.

³ *Drumm-Flato Co. v. Edmisson*, 17 Okla. 344; 87 Pac. 311 affirmed in 208 U. S. 534, 52 L. ed. 606; *Lynch v. McGahm*, 7 Cal. App. 132, 93 Pac. 1044.

⁴ *Bradley v. Harden*, 73 Ala. 70.

⁵ *McShane et al. v. Howard Bank*, 73 Md. 135, 20 Atl. 776, 10 L. R. A. 552.

⁶ *Meyer v. Phoenix Ins. Co.*, 95 Mo. App. 721, 69 S. W. 639; *Perkins v. Marrs*, 15 Col. 262, 25 Pac. 168; *Newcomb, etc. Co. v. Baskett*, 14 Bush. 658.

⁷ *Citing Pengra v. Wheeler*, 24 Ore. 532, 34 Pac. 354, 21 L. R. A. 726.

the property may recover it as a part of the damages suffered by him." ¹

7. RE-PURCHASE BY OWNER AFTER CONVERSION

§ 675. **Damage is Usually Amount Paid.** — It frequently occurs that the owner of chattels converted, in order to regain possession, buys them back from the one holding them and subsequently sues the wrong-doer for the conversion. In such case, the general rule allowing recovery of the value of the property at the time of conversion with interest does not apply. The standard most frequently adopted is the amount it costs him to regain it. Thus, a sheriff wrongfully attached and sold plaintiff's property as the goods of a third person. Plaintiff re-bought them from the purchaser. In an action against the sheriff for conversion it was held that plaintiff's measure of damages was the amount paid by him to get them back.² And in another case involving the same question the court said: "But it appears that the plaintiff attended the auction, and, through the intervention of a friend, regained possession of his goods, by paying the auction price and five dollars more to his friend; and it is not shown that, when so received they were not in good order. This must be allowed to go in diminution of the damages, which the plaintiff would otherwise be entitled to recover. Whatever damages he sustained, over and above what was fairly due to the defendant, in regaining possession of his goods he is entitled to have allowed him. The five dollars paid to his friend for bidding off the goods, five dollars and thirty-one cents for auctioneer's fees, five dollars for his own time in endeavoring to regain possession of his goods, and six dollars, being the difference between the freight demanded and the amount tendered, with interest on these sums, making twenty-two dollars and fifty cents, the plaintiff must have judgment for."³ He cannot have judgment for the value of the goods, for he was never divested of his property in them. Neither the acts of the defendant nor the sale at auction, not being in market overt — there being none such in this country, as there is in England — could effect a change in the right of property."⁴

§ 676. **Same Subject.** — It was likewise said in another case of a similar nature in which the owner had repurchased a safe from one

¹ *Durham v. Com. Nat'l Bank*, 45 Ore. 385, 77 Pac. 902.

² *Dodson v. Cooper*, 37 Kan. 346, 15 Pac. 200; *Brown v. Leath*, 17 Tex. Civ. App. 262, 42 S. W. 655; *Kline v. McCandless*, 139 Pa. 223, 20 Atl. 1045.

³ Citing *Murray v. Burling*, 10 Johns. 172; *Bank v. Leavitt*, 17 Pick. 1.

⁴ *Hunt v. Haskell*, 24 Me. 339.

who had bought it at a wrongful sheriff's sale: "It will be borne in mind that the plaintiffs obtained the safe under the purchase from Kirkland, who bought at the sheriff's sale on his own account. Had they purchased it at such sale under protest all of the authorities agree that they could still maintain this action, and that the measure of their damages would be the price they were compelled to pay for it.¹ It should be observed that where the property is thus bid off by the true owner, probably he would not be allowed to recover more than its fair market value, although he should pay a greater sum to obtain possession thereof; and that he may recover any special damages, in addition, which he has suffered intermediate the conversion and return of such property. But it seems that such special damages should be stated in the complaint. The foregoing cases rest upon the proposition that in these actions damages are to be assessed upon equitable principles, and that the sum paid to obtain possession of the property wrongfully converted is a just and full compensation for the wrong suffered by the owner. It seems to us that the same principles should be applied to this case. Although the plaintiffs did not bid off the safe at the sheriff's sale, yet they obtained possession of it by paying \$118, and they do not allege and have not proved any special damages. We hold, therefore, that the latter sum is the true measure of damages, and the jury should have been so instructed."²

§ 677. **Re-purchase Equivalent to Return.** — The Texas court, quoting from and approving, the above cases, has said: "In-so-far as the question now under consideration is concerned, we are unable to see that it makes any difference whether the converted property be recaptured by the owner, voluntarily returned and accepted, or bought in by him at a sale. The conditions upon which he is permitted to recover its full value are that he was the sole owner of the property; that it was taken without his consent; and that it has not been restored to and accepted by him. If the testimony shows that either of these conditions is wanting, then he is not entitled to recover its full value; and any method by which he voluntarily reacquires the property must, it seems to us, be regarded as a restoration; and, in that sense, the restoration is just as complete whether he buys it from the tort-feasor, pays him a given sum to release it, or accepts it from him when gratuitously tendered. In either case he regains possession of his property, and therefore it will not require its full value to recompense him for the loss he too sustained, unless it

¹ Citing *Ford v. Williams*, 24 N. Y. 359; *Baker v. Freeman*, 9 Wend. 36; *Hurlburt v. Green*, 41 Vt. 490; *McInroy v. Dyer*, 47 Pa. St. 118.

² *Spreague v. Brown*, 40 Wis. 620.

has cost him that much to regain it. Nor is it correct, in actions for damages for conversion, where the owner has re-purchased the property from the tort-feasor, to treat the amount so paid as a part of the purchase money paid by the plaintiff for his title to the property, and not as a sum expended in its recovery. Such a suit is predicated upon the proposition that the plaintiff was the owner of the property when taken; and, if he was not such owner, then, as to him, there was no conversion. If he asserts that he acquired any title by his purchase from the tort-feasor, then he admits that he was not the sole owner when the property was taken; and, if not then the sole owner, he cannot recover its full value. Necessarily, his title must antedate the taking, and therefore it cannot have its origin in any transaction subsequent thereto.

We have given this case mature and careful consideration; and, unless some item of special damage not indicated by the pleadings and evidence be shown, our conclusion is that interest of the value of the property from the time of its seizure to the time it was sold, the amount paid by the plaintiff on his bid for the property, and interest on said amount from the time it was paid, and whatever amount, if any, the property may have depreciated in value while it was withheld from the plaintiff, is the correct measure of damages.”¹

8. AMOUNT RECEIVED FROM SALE BY DEFENDANT

§ 678. **Generally no Criterion of Damages.** — It has been held that if the defendant has sold property which he has converted, the owner may elect to recover the proceeds of the sale with interest from that date to the trial.² But the general rule is that the price received is not the proper measure of damages.³ It has been said, however, that where a party disposes of chattels by consent of the owner, in an action by the latter for a conversion of the proceeds that he could recover the amount of such proceeds, and not the value of the property.⁴ It is apparent in this case that the action was not for the conversion of the property itself, and therefore its value was immaterial. The same question was decided similarly in another state in a case where the property was left with the defendant for

¹ *Field v. Munster*, 32 S. W. 417 (Tex. Civ. App.), 89 Tex. 102, 33 S. W. 852. See the following cases: *Blewett v. Miller*, 131 Cal. 149, 63 Pac. 157; *Felton v. Fuller*, 35 N. H. 226; *Winburne v. Bryan*, 73 N. C. 47; *Baldwin v. Porter*, 12 Conn. 473; *Lazarus v. Ely*, 45 Conn. 504; *Long v. Lamkin*, 9 Cush. 361.

² *Ingram v. Rankin*, 47 Wis. 406, 2 N. W. 755, 32 A. R. 762.

³ *Philbrook v. Kellogg*, 18 Hun 399; *Fox v. Jones*, 39 La. Ann. 929, 3 So. 95; *Kingsbury v. Smith*, 13 N. H. 109; *Buckmaster v. Smith*, 22 Vt. 203.

⁴ *Chase v. Blaisdell*, 4 Minn. 90.

sale, and he made the sale but refused to account for the proceeds.¹ But in another case in the same state where the defendant had wrongfully attached and sold the chattels, it was held that the measure of damages which the plaintiff could recover was the full market value and not what the goods brought at the sale.²

9. CONFUSION OF GOODS

§ 679. **Effect of Good Faith on Measure of Recovery.** — Relatively few cases have arisen in which courts have announced the rule as to what damages shall be given a plaintiff whose goods have been confused or intermingled with those of the defendant and as a result of the latter's act. The reason of this doubtless is that trover is not generally resorted to as a remedy for such a wrong. It seems from the adjudications in which the question has been decided that the good or bad faith of the defendant in causing the confusion may be one of the determining factors. If the confusion or intermingling was innocently made, yet rendered it impossible to identify the plaintiff's property, he is entitled to the entire property if necessary to get the value of his own.³ And where the defendant has wrongfully and willfully confused the plaintiff's goods with his own it is said that he must be charged with the utmost value of the goods so confused.⁴ "When the nature of a wrongful act is such that it not only inflicts an injury, but takes away the means of proving the nature and extent of the loss, the law will aid the remedy against the wrongdoer, and supply the deficiency of proof caused by his misconduct by making every reasonable intendment against him, and in favor of the person whom he has injured. A man who willfully places the property of another in a situation where it cannot be recovered, or its true amount or value ascertained by mixing it with his own, or in any other manner, will consequently be compelled to bear the inconvenience of the uncertainty or confusion which he has produced, even to the extent of surrendering the whole, if his share cannot be distinguished, or responding in damages for the highest value at which the property in question can reasonably be estimated."⁵

¹ *McCready v. Phillips*, 44 Neb. 790, 63 N. W. 7.

² *Peckinbaugh v. Quillin*, 12 Neb. 586, 12 N. W. 104.

³ *Gittings v. Winter*, 101 Md. 194, 60 Atl. 630; *Lance v. Butler*, 135 N. C. 419, 47 S. E. 488.

⁴ *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 108.

⁵ *Armory v. Delamirie*, 1 Smith's Lead. Cas. pt. 1, 679, citing *Ryder v. Hathaway*, 21 Pick. 298; *Clark v. Miller*, 4 Wend. 628; *Bailey v. Shaw*, 24 N. H. 297, 55 A. D. 241; *Preston v. Leighton*, 6 Md. 88. Quoted and approved in *Mining Co. v. Mining Co.*, 11 Col. 223, 7 A. S. R. 226. See *Ayre v. Hixon et al.*, 53 Ore. 19, 98 Pac. 515, Ann. Cas. 1913E 659.

§ 680. **Where Gas or Oil Intermingled.** — Where natural gas from a well owned by the plaintiff, but claimed by the defendant, and in the defendant's possession, was by the defendant conducted to a pipe line receiving the gas from sixty other wells owned by the defendant, without any effort to measure the amount contributed to the line by such well, it was held that the plaintiff was entitled to recover an aliquot part of the gross product of the sixty wells.¹ So, where plaintiff was by contract entitled to a royalty of one-eighth the oil from one well on his own land; the lessee had other wells on adjoining lands, then fraudulently commingled the oil from all of them and kept no account of that from plaintiff's; it was held that plaintiff was entitled to one-eighth of the whole.²

10. FOR CONVERSION OF MORTGAGED CHATTELS

§ 681. **In Favor of Mortgagee.** — As between a mortgagor and mortgagee, the latter is the owner of a special interest in the mortgaged chattels, and as a general rule, the measure of recovery in favor of the mortgagee and against the mortgagor for a conversion of the property is the amount of the secured debt and interest, not exceeding, however, the value of the property.³ The mortgagee's interest is that of a lien-holder, and his compensation must be for damages to his lien.⁴ And this same standard has been established where the mortgaged chattels have been levied upon either in attachment or under execution, in an action against the mortgagor.⁵ Thus where the mortgagee brought trover against judgment creditors of the mortgagor for levying upon and selling the mortgaged property, his recovery was limited to the amount of the debt secured and interest; and it appearing that plaintiff was the assignee of the mortgage, but had paid for it much less than the face value of the note secured, it was held nevertheless that the plaintiff was entitled to recover the whole amount secured.⁶ In another action, brought by a mortgagee against purchasers from the mortgagor of a part of the

¹ Great So. Gas Co. v. Logan Gas Co., 155 Fed. 114, 83 C. C. A. 574, quoted from note in Ann. Cas. 1913E 673; Stone v. Marshall Oil Co., 208 Pa. St. 85, 57 Atl. 183, 101 A. S. R. 904.

² Kleppner v. Lemon, 197 Pa. St. 430, 47 Atl. 353.

³ Parish v. Wheeler, 22 N. Y. 494, Williams v. Dobson, 26 S. C. 110; Perrigo, etc. Co. v. Grimes, 2 Col. 651; Lowe v. Wing, 56 Wis. 31; and the same is true if the property has been converted by a junior mortgagee and trover brought against him by the holder of the prior mortgage: Stanley v. Citizen's C. & C. Co., 24 Col. 103, 49 Pac. 35; Harris v. Grant, 96 Ga. 211, 23 S. E. 390.

⁴ Peck v. Inlow, 8 Dana (Ky.) 192.

⁵ Becker v. Dunham, 27 Minn. 32; Albert v. Linden, 46 Md. 334; Sherman v. Finch, 71 Cal. 68.

⁶ Ganong v. Green, 71 Mich. 1, 38 N. W. 661, 64 Mich. 488, 31 N. W. 461.

mortgaged chattels, the trial court told the jury that it was incumbent upon plaintiff to prove that the remainder of the property embraced in the mortgage was insufficient to pay his debt before he could recover for the conversion of that part bought by the defendant. The higher court held this error on the ground that a mortgagee is entitled to have his debt satisfied out of any part of the property, and plaintiff's damages were held to be the amount of his debt, not exceeding the value of the property.¹ The same considerations limiting the amount of recovery in favor of the mortgagee as above discussed do not apply in case the conversion was by an entire stranger. As to such a party, if the mortgagee is entitled to the possession of the chattels, he is entitled to recover their full value without regard to the amount of his debt.² If the plaintiff be the holder of a junior mortgage, his recovery will be limited to his interest, and subject to the lien of the prior mortgage.³ And the same is true if the suit be against the prior mortgagee.⁴

§ 682. **In Favor of Mortgagor.** — As a sort of corollary to the rule stated in the preceding section, if the action be by the mortgagor for a conversion by the mortgagee the measure of damages in favor of the former is the value of the property above the amount of the secured debt.⁵ Stated in other words, the measure of damages has been said to be the difference between the value of the property at the time of the conversion and the mortgage debt.⁶ So, where the defendant was a mortgagee entitled to possession with power to sell at the time of the conversion, but who became a wrong-doer by reason of the manner in which he acquired possession, or in the irregularity of the sale, he was held liable to the mortgagor, in the absence of proof of special damage, for only the value of the property less the secured debt.⁷ And where the action was against the mortgagee and an auctioneer who sold the goods at foreclosure sale, it being shown that a part of the goods sold were not covered by the mortgage, it was held that plaintiff was entitled to recover the value

¹ *Bailey v. Godfrey*, 54 Ill. 507, 5 A. R. 157. To the same effect see *Appleton Mill Co. v. Warder*, 42 Mich. 117, 43 N. W. 791; *Densmore v. Mathews*, 58 Mich. 616, 26 N. W. 146.

² *Adamson v. Peterson*, 35 Minn. 529, 29 N. W. 321; *Watkins v. Bank*, 56 Tex. Civ. App. 138, 115 S. W. 304.

³ *Huellmantel v. Vinton*, 116 Mich. 621, 74 N. W. 1004; *Straw v. Jenks*, 6 Dak. 414, 43 N. W. 941.

⁴ *Lovejoy v. Bank*, 5 N. D. 623, 67 N. W. 956.

⁵ *Burton v. Randall*, 4 Kan. App. 593, 46 Pac. 326; *McClure v. Hill*, 36 Ark. 268; *Brinck v. Freoff*, 44 Mich. 69; *Howerly v. Hoover*, 97 Ia. 581, 66 N. W. 772.

⁶ 2 *Cobbey, Ch. Mortg.* § 1036; *Cushing v. Seymour Co.*, 30 Minn. 301, 15 N. W. 249; *Tarp v. Gulseth*, 37 Minn. 135, 33 N. W. 550; *Bryan v. Baldwin*, 52 N. Y. 232; *Springer v. Jenkins*, 47 Ore. 502, 84 Pac. 479.

⁷ *Jones v. Horn*, 51 Ark. 19, 9 S. W. 309, 14 A. S. R. 17.

of the mortgaged property, less the secured debt, and the full value of that not so covered by the mortgage.¹ And the amount of the secured debt will be deducted from the value of the property where it is shown that the mortgagee has been guilty of prematurely seizing or selling the property mortgaged.² But where the right of the mortgagee to take possession accrued shortly after he seized the chattels, it was held that the mortgagor could recover only for the detention in the meantime.³ But it has been said that if the mortgagee becomes the purchaser at his own sale, for a grossly inadequate price, and converts the property to his own use and refuses to permit the mortgagor to exercise his right of redemption, he is liable for the fair value of the property.⁴ These are cases between the mortgagor and mortgagee. If the action be against a stranger, the mortgagor, if he had been in possession, is entitled to recover the full value of the property.⁵

11. WHEN PLEDGED PROPERTY CONVERTED

§ 683. **Damages in Favor of Pledgor.** — The question of the proper measure of damages for the conversion of pledged property has been in a way considered in this chapter in the discussion of the amount recoverable for property of a fluctuating value. It may here be said generally that in the absence of circumstances of an aggravating nature, in an action by a pledgor against his pledgee for a conversion of the pledged property, the pledgee is entitled to an allowance for the amount of the debt due him. In other words, where the pledgee converts the property to his own use, as by making a wrongful or illegal sale, the debt thereby becomes paid to the extent of the value of the property and if such value be more than the debt, the pledgor is entitled to recover the difference as his damages.⁶ The effect of this rule simply is to put the pledgor in the position he occupied prior to the conversion.⁷ Where scrip had been pledged for a debt, but the pledgee sold more of it than was necessary to pay the debt, the pledgor was held entitled to recover the difference between the price for which the scrip was sold and the price paid by

¹ *Kearney v. Clutton*, 101 Mich. 106, 59 N. W. 419, 45 A. S. R. 394.

² *Kimball v. Marshall*, 8 N. H. 291; *Treat v. Gilmore*, 49 Me. 34; *Street v. Sinclair*, 71 Ala. 110; *Rall v. Cook*, 77 Mich. 681, 43 N. W. 1069; *Lusch v. Huber Mfg. Co.*, 79 Neb. 45, 112 N. W. 284.

³ *Deal v. Osborne*, 42 Minn. 102.

⁴ *Lee v. Fox*, 113 Ind. 98.

⁵ *Vandiver v. O'Gorman*, 57 Minn. 64, 58 N. W. 831; *Cram v. Bailey*, 10 Gray 87; *Turnpike Co. v. Fry*, 88 Tenn. 296, 12 S. W. 720; *Becker v. Bailies*, 44 Conn. 167.

⁶ *Kilpatrick v. Dean*, 19 N. Y. S. R. 837; *Baltimore Ins. Co. v. Dalrymple*, 25 Md. 269; *Jarvis v. Rogers*, 15 Mass. 389; *Rosenzweig v. Frazer*, 82 Ind. 342; *First Nat'l Bank v. Boyce*, 78 Ky. 42, 39 A. R. 198.

⁷ *Towle v. Ward*, 113 Mass. 548, 18 A. R. 534.

the pledgor to replace the excess.¹ But where the pledgor had, prior to the conversion by the pledgee, tendered to the latter the amount of the debt due, which tender the pledgee had wrongfully refused it was held that the tender was equivalent to payment, and that for the conversion the pledgor could recover the full value of the property.² The same recovery is allowed where full payment of the debt has been actually made prior to the conversion.³ But the payment or tender of the debt is not a condition precedent to the pledgor's right of action for the conversion.⁴ If the pledgor has recovered his property after the conversion, however, it has been held proper to allow him as damages the expense he has necessarily incurred, the value of his time and of the use of the property while he was wrongfully kept out of possession, the whole, however, not to exceed the value of the property.⁵

§ 684. **Damages in Favor of Pledgee.** — Following the rule that as against a stranger to the title of personal property the owner of a special interest therein may recover its whole value, a pledgee is not limited in his recovery to the amount due him from the pledgor, where the action is against one other than the pledgor. In such case he recovers the full value, being responsible to the pledgor for any excess over the secured debt.⁶ In an action by a pledgee against a corporation for cancelling the pledged shares without notice to him it was held that the measure of damages was the amount due to the pledgee, with interest. The court said that the pledgee "may maintain an action against the wrong-doer for the damages suffered by him caused by such wrongful destruction. If he is liable to account to his pledgor for the value of the property destroyed, he may recover its full value, and if he is not so liable he may recover the actual damages suffered by him up to the value of the chattel destroyed."⁷ If the conversion was the act of the pledgor, or one claiming under him, the pledgee will be limited to recovery of the amount of the debt due him from the pledgor.⁸

¹ *Fitzgerald v. Blocher*, 32 Ark. 742, 29 A. R. 3. And it was held in this case that the pledgor's acceptance of the surplus of the sale did not defeat his right to recover damages.

² *Hyams v. Bamberger*, 10 Utah 3, 36 Pac. 202.

³ *Nesbitt v. Moore*, 39 S. C. 351, 17 S. E. 798.

⁴ *Feige v. Burt*, 118 Mich. 243, 74 A. S. R. 390.

⁵ *First Nat'l Bank v. Rush*, 56 U. S. App. 556, 85 Fed. 539, 29 C. C. A. 333.

⁶ *Thompson v. Toland*, 48 Cal. 99; *St. Louis v. Bissel*, 46 Mo. 157; *Cramer v. Marsh*, 5 Col. App. 302, 38 Pac. 612.

⁷ *Brown v. Union, etc. Assoc.*, 28 Wash. 657, 69 Pac. 383.

⁸ *Levan v. Wilten*, 135 Pa. St. 61, 19 Atl. 945; *Burk v. Webb*, 32 Mich. 173; *Seaman v. Luce*, 23 Barb. 240; *Bradley v. Burkett*, 82 Ga. 255, 11 S. E. 492; *Warner v. Mathews*, 18 Ill. 83; *Chamberlin v. Shaw*, 18 Pick. 278.

§ 685. **Collateral Security.** — If collateral pledged as security for a debt consists of bonds, notes, bills or other instruments for the payment of money there is a presumption of law that for a conversion of them by the pledgee he will be chargeable for the amount which upon the face of the instruments appears to be recoverable.¹ Still the general rule is that the damages to the pledgor must be measured by his actual injury, the above statement being merely a rule of evidence capable of being overcome by other evidence.² So, where the action involves a promissory note, the measure of damages is not the face value of the note where it is shown that the maker is insolvent.³ Conversion is frequently charged against a pledgee of collaterals for wrongfully surrendering them. In such cases it has sometimes been held that by so handling the paper the pledgee elected to take it for the amount due according to its terms.⁴ But this is not the proper rule to be applied in all cases, for thereunder it might frequently occur that the recovery would be grossly disproportionate to the injury. Thus, where a bank had received a note as collateral security and had subsequently, without the consent of the pledgor, compromised it by receiving the one half thereof from the maker, it was held that the bank was bound to credit the pledgor with only the amount received upon proof that the compromise was advantageous and that the maker was insolvent and unable to pay the balance.⁵ But the converse of this is true that the holder has no right to surrender the instrument to the disadvantage of the pledgor.⁶

12. UNDER CONDITIONAL SALES

§ 686. **Where Purchase Price Partly Paid.** — The amount of damages to be recovered for the conversion of chattels in favor of one who has retained title pending payment will depend somewhat upon the degree of performance of his contract by the purchaser. It has been held in one or two cases that the seller after breach of condition — that is, when he was entitled to re-take the property — could recover for its conversion only the portion of the purchase

¹ *Hazzard v. Duke*, 64 Ind. 220; *Thayer v. Manley*, 73 N. Y. 305.

² *Noland v. Clark*, 10 B. Mon. 239; *Cushing v. Seymour*, 30 Minn. 301.

³ *Walrod v. Ball*, 9 Barb. 271; *Potter v. Merchants' Bank*, 28 N. Y. 641, 86 A. D. 273; *Vose v. Florida Ry. Co.*, 50 N. Y. 369.

⁴ *Cocke v. Chaney*, 14 Ala. 65; *Wood v. Matthews*, 73 Mo. 481.

⁵ *Exeter Bank v. Gordon*, 8 N. H. 66, cited and approved in *Griggs v. Day*, 136 N. Y. 152, 74 A. S. R. 704, 18 L. R. A. 120.

⁶ *Depuy v. Clark*, 12 Ind. 427; *Union Trust Co. v. Rigdon*, 93 Ill. 458. For a discussion of the measure of damages for the conversion of bills and notes in general, see *Sedgwick, Damages*, § 256.

price remaining unpaid.¹ This will not do in all cases, for the agreement of sale often is that payment shall be made at a time stated, and if payment is not so made, the vendor has the right to the whole of the property; and in such case he is clearly entitled to recover its full value if it has been converted.² It is the general rule, however, that where the property has been partly paid for, this fact may be shown in mitigation of damages.³ But where the action is against a vendee, mortgagee or attaching creditor of the conditional vendee, the vendor is entitled to recover the full value of the property, where the conditional vendee is not entitled to transfer the property to another prior to full payment.⁴ In favor of the vendee and against the vendor the recovery will be limited to the amount paid, with interest.⁵

13. CORPORATE SHARES

§ 687. **Where Corporation Refuses to Transfer Stock or Otherwise Converts It.** — The purchaser from a holder of shares in a corporation has the right to a transfer on the books to the company so that the stock shall stand in his name; and if the corporation refuse to make such transfer, he may hold it liable as for a conversion. For such conversion, the owner has been held entitled to recover the value of the stock at the time of the demand for a transfer, together with interest and such special damages in some cases, as he may be able to show.⁶ So, where fraudulent shares had been issued, and the holder demanded the issue of a new certificate which could not be done for the reason that such would cause an overissue of the capital stock, the court said: "The defendant cannot be compelled to issue new certificates or to recognize the old ones as valid, because to do so would cause an overissue of its capital stock; but it is liable in

¹ *Woods v. Nichols*, 21 R. I. 537, 45 Atl. 548, 48 L. R. A. 773; 22 R. I. 225, 47 Atl. 211; *Davis v. Bliss*, 187 N. Y. 77, 79 N. E. 851, 10 L. R. A. (N. S.) 458.

² *Buckmaster v. Smith*, 22 Vt. 203; *Gormully, etc. Co. v. Catherine*, 25 Misc. 336, 55 N. Y. Supp. 475; *Hawkins v. Hersey*, 86 Me. 394, 30 Atl. 14.

³ *Town v. Harlam*, 82 Me. 84, 24 Atl. 587; *Ross v. McDuffie*, 91 Ga. 120, 16 S. E. 648; *Guilford v. McKinley*, 61 Ga. 230; *Colby v. Kimball Co.*, 99 Ia. 321, 68 N. W. 786; *Boutell v. Warne*, 62 Mo. 350; *Meixell v. Kirpatrick*, 29 Kan. 679; *Hall v. Nix*, 156 Ala. 423, 47 So. 335.

⁴ *Lillie v. Dunbar*, 62 Wis. 198; *Brown v. Haynes*, 52 Me. 578; *Colcord v. McDonald*, 128 Mass. 470.

⁵ *Smith v. Goff*, 29 R. I. 439, 72 Atl. 289; *Clark v. Clement*, 75 Vt. 417, 56 Atl. 94.

⁶ *Dooley v. Gladiator Co.*, 134 Ia. 468, 109 N. W. 864; *Briggs v. Kennett*, 8 N. Y. Misc. 264, 28 N. Y. Supp. 540; *Bank of Culloden v. Bank of Forsyth*, 120 Ga. 575, 48 S. E. 226; *Myers v. Chittyna Exploration Co.*, — (Cal.) —, 129 Pac. 469; *Clarke v. Eureka Bank*, 123 Fed. 922, 130 Fed. 325; *Seymour v. Ives*, 46 Conn. 109; *Boylan v. Huguet*, 8 Nev. 345; *West Branch, etc. Co.'s Appeal*, 81 Pa. St. 19; *Baltimore Ry. Co. v. Sewell*, 35 Md. 238; *Salt, etc. Co. v. Hickey*, 4 Ari. 240, 36 Pac. 171.

damages. In assessing damages, the superior court has taken the value of the stock to be its market value at the time when the defendant first refused to recognize the stock as valid and to permit a transfer of it. This would be the rule of damages if the certificates were valid.¹ We think the same rule of damages applies to these certificates."² The presumption of law is that the actual value of the stock is the par value. This amount the plaintiff may recover against the corporation refusing to make a transfer, where there is no other evidence of value. But if plaintiff has alleged the actual value to be less than par, it is incumbent upon him to prove what is the actual value.³ As refuting the presumption that the par value is the actual value, evidence may be admitted as to the insolvency of the corporation, the value of its property, and its liabilities.⁴ In a case where the shares were encumbered by an assessment equal to their par value, but the actual value was \$200 more than par, plaintiff was allowed to recover the \$200.⁵

§ 688. Where Conversion is by an Individual. — The doctrine that the measure of damages for the conversion of stock in a corporation is the value of the shares does not apply where there is merely a technical conversion shown. In such case the rule is that the plaintiff can recover only nominal damages.⁶ So, where the defendant had borrowed certain shares in a corporation but did not return them prior to the dissolution of the company, it was held that the plaintiff could recover from him the value of the shares at the time of demand; and if they had no value at that time, his damages would be nominal only.⁷ In general, the same damages will be assessed against an individual as against a corporation for the conversion of stock. Such are measured by the value of the stock with interest and such special damages as may be shown. In some states intermediate dividends may also be recovered.⁸ But it is said by other courts that such dividends are not recoverable, since the allowance of interest from the date of conversion is compensation for

¹ *Sargent v. Franklin Ins. Co.*, 8 Pick. 90; *Wyman v. American Powder Co.*, 8 Cush. 168.

² *Allen v. South Boston Ry. Co.*, 150 Mass. 200, 5 L. R. A. 716.

³ *Uncle Sam Oil Co. v. Forrester*, 79 Kan. 861; *Walker v. Bernent*, — (Ind.) —, 94 N. E. 339.

⁴ *Tewis v. Ryan*, 13 Ari. 120, 106 Pac. 461. An action, however, for breach of contract: *Smith v. Traders' Nat'l Bank*, 82 Tex. 368; *Hawkins v. Mellis, etc. Co.*, 127 Minn. 393, 149 N. W. 663, Ann. Cas. 1916C, 640.

⁵ *Budd v. Street Ry. Co.*, 15 Ore. 413, 15 Pac. 659, 3 A. S. R. 169.

⁶ *Gruman v. Smith*, 81 N. Y. 25.

⁷ *Fosdick v. Greene*, 27 Ohio St. 484, see *Blair v. Rose*, 26 Ind. App. 487.

⁸ *Doyle v. Burns*, 123 Ia. 488; *Baltimore Ry. Co. v. Sewell*, 35 Md. 238; *Bereich v. Marye*, 9 Nev. 312; *Boston Ry. Co. v. Richardson*, 135 Mass. 473; *Hubbell v. Blandy*, 87 Mich. 209; *Nutting v. Thomasson*, 57 Ga. 418.

the use of the stock.¹ And it has been elsewhere held that such dividends can only be recovered when a separate cause of action therefor is set up.² Where corporate stocks have been converted by a malicious wrongdoer the owner may recover an amount equal to the highest prices reached by the stocks to the time of trial, provided it appears that the owner has brought his action promptly after the conversion and that he has pressed the suit with reasonable celerity, and also that the stocks made their top prices during the time when the action was being so pressed.³ The weight of authority is to the effect that these rules apply whether the action is for the conversion of the shares themselves or for the certificate representing them.⁴

14. DAMAGES AGAINST CARRIERS

§ 689. **For Loss or Non-delivery of Goods.** — Where goods and chattels have been entrusted to a carrier for transportation under an agreement that they shall be delivered at a certain place, the carrier is liable for loss of same while in its possession or for a failure to deliver under the contract. For such loss or failure to deliver, the carrier may ordinarily be held either in an action for breach of contract or in an action of tort for a violation of its duty as a carrier. But while the failure of the carrier to make delivery without any circumstance excusing same may be treated as either a breach of contract or a conversion,⁵ yet for a loss of the goods, the proper action is not for a conversion but for a violation of the carrier's duty to carry and deliver.⁶ Where the action is for a conversion, the measure of damages in general is the market value of the property at the place where it should have been delivered, less the reasonable charges for carriage if these have not been paid in advance, adding interest to the value from the time of the conversion.⁷ But where the complaint

¹ *Citizens, etc. Co. v. Robbins*, 144 Ind. 671.

² *Ralston v. Bank of California*, 112 Cal. 208, 44 Pac. 476.

³ *Kavanaugh v. McIntyre*, 74 Misc. 222, 133 N. Y. S. 679, cited in note Ann. Cas. 1916C 642.

⁴ *Deck v. Feld*, 38 Mo. App. 674; *Barth v. Bank*, 67 Ill. App. 131; *Morton v. Preston*, 18 Mich. 60, 100 A. D. 146; *Connor v. Hillier*, 11 Rich. 193, 73 A. D. 105. See, however, *Daggett v. Davis*, 53 Mich. 35, 18 N. W. 548, 51 A. R. 91.

⁵ *Wilson v. Cal. Cent. Ry. Co.*, 94 Cal. 166, 29 Pac. 861, 17 L. R. A. 685; *Loeffler v. Keokuk-Northern Line Packet Co.*, 7 Mo. App. 185; *Bird v. Georgia Ry. Co.*, 72 Ga. 655.

⁶ *Maguin v. Dinsmore*, 70 N. Y. 410, 26 A. R. 608.

⁷ *Clements v. Burlington, etc. Ry. Co.*, 74 Ia. 442, 38 N. W. 144; *Cushing v. Wells Fargo Co.*, 98 Mass. 550; *Bailey v. Shaw*, 24 N. H. 297, 55 A. D. 241; *Atchison, T. & S. F. Ry. Co. v. Lawler*, 40 Neb. 356, 58 N. W. 968; *Ross v. Chi. R. I. Pac. Ry.*

stated only the value of the goods at the shipping-point, and there was nothing to show a greater worth at the place of destination, the plaintiff was held entitled to recover only the value at the shipping-point with interest from the time of loss.¹ But in the event the property involved has no market value, the damage must be estimated as the real value to the owner.² So in a case involving the loss of a family portrait, the court said: "The general rule in trover and in contract for not delivering goods, undoubtedly is the fair market value of the goods. But this rule does not apply when the article sued for is not marketable property. To instruct a jury that the measure of damages for the conversion or loss of a family portrait is its market value would be merely delusion. It cannot with any propriety be said to have any market value. The just rule of damages is the actual value to him who owns it, taking into account its cost, the practicability and expense of replacing it and such other considerations as in the particular case affect its value to the owner."³

§ 690. **Wrongful Delivery by Carrier.**—If the carrier, after transporting goods and chattels, deliver them to the wrong person, or make a mis-delivery in any other manner, he will be liable in the same measure as if he had made no delivery at all—that is for the market value at the time and place of delivery, deducting whatever freight may be due. In a case where goods had been delivered to the wrong person who sold them, the carrier was held liable for the highest market price reached by such goods between the delivery and bringing suit.⁴ In a Tennessee case where the conversion had been waived and assumpsit brought, the court said: "A question is made as to the measure of damages. The court allowed the value of the goods at Memphis instead of their cost at Cincinnati. There was a difference of one hundred dollars. At the latter place, it is agreed they were worth or cost five hundred dollars, and at the former six hundred dollars. Where a carrier makes a wrong delivery or fails to deliver, so as to become liable, 'the net value of the goods

Co., 119 Mo. 290, 95 S. W. 977; *Galveston, etc. Ry. Co. v. Efron*, 38 S. W. 639 (Tex. Civ. App.); *Little v. Boston, etc. Ry. Co.*, 66 Me. 239; *Hart v. Spalding*, 1 Cal. 213; *Chicago, etc. Co. v. Dickinson*, 74 Ill. 249; *So. Ry. Co. v. Jones Cotton Co.*, 167 Ala. 575, 52 So. 899; *Atlantic, etc. Co. v. Howard Supply Co.*, 125 Ga. 478, 54 S. E. 530; *Tebbs v. Cleveland, etc. Co.*, 20 Ind. App. 192, 50 N. E. 486; *Lewis v. The Ship Success*, 18 La. Ann. 1.

¹ *Blumenthal v. Brainerd*, 38 Vt. 402, 91 A. D. 349; *Kyle v. Laurens Ry. Co.*, 10 Rich. L. 382, 70 A. D. 231.

² *Denver, etc. Co. v. Frame*, 6 Col. 382; *Mo. etc. Ry. Co. v. Davidson*, 60 S. W. 278 (Tex. Civ. App.).

³ *Green v. Boston, etc. Ry. Co.*, 128 Mass. 221, 35 A. R. 370; *Stickney v. Allen*, 10 Gray 352.

⁴ *Arrington v. Wilmington, etc. Ry. Co.*, 51 N. C. 68, 72 A. D. 559.

at the place of delivery is the measure of damages.'"¹ Where the owner had shipped cotton with directions to the carrier to deliver it to a factor at a designated place, which factor had been instructed to hold it for further orders, but the carrier delivered it to a different place and to a different factor who had no instructions concerning it and who accordingly sold it immediately, it was held that the carrier was liable for the price of the cotton at the time the owner got full reports of the sale, such price having risen rapidly after the sale.² And even where the plaintiff had mis-directed the goods by sending them to a fictitious person, the carrier was held liable for their full value when it delivered the goods to one falsely claiming to be the one to whom they were sent.³ While without any circumstances of a mitigating nature the measure of damages for a mis-delivery is the market value of the goods at the place of delivery with interest as herein explained,⁴ yet if the person to whom they were wrongfully delivered accounted to the owner for them, the latter can recover only nominal damages against the carrier,⁵ and if he receive but part of them, he can recover only for the part not received.⁶

§ 691. **Damages for Deviation from Instructions.** — A shipper of goods employing a carrier to transport them may give instructions to the carrier as to the manner or route of carriage and the condition of delivery. If the carrier accept the goods with such instructions, it is bound to follow the instructions so given; and if the shipment be made in a manner contrary thereto, the carrier becomes liable as an insurer for the safe delivery of the goods.⁷ Thus, where a carrier undertook to forward goods beyond its own line, but the connecting carrier designated by the shipper refused to receive them and the initial carrier on its own authority attempted to send them over another route, it was held liable to the shipper for the value of the

¹ *Dean v. Vaccaro*, 2 Head 488, 75 A. D. 744, citing: 2 *Parsons on Cont.* 468; *Watkinson v. Laughton*, 8 Johns. (N. Y.) 213; *Amory v. M'Gregor*, 15 Johns. (N. Y.) 24, 8 A. D. 205.

² *Arrington v. Wilmington, etc. Ry. Co.*, *supra*.

³ *Winslow v. V. & M. Ry. Co.*, 42 Vt. 700, 1 A. R. 365; *Dunbar v. Boston, etc. Co.*, 110 Mass. 26, 14 A. R. 576. But see *Congar v. Chi. & N. W. Ry. Co.*, 24 Wis. 157, 1 A. R. 164.

⁴ *Baltimore, etc. Ry. Co. v. Pumphrey*, 59 Md. 390; *Mass. L. & T. Co. v. Fitchburg, etc. Ry. Co.*, 143 Mass. 318, 9 N. E. 669; *McCulloch v. McDonald*, 91 Ind. 240; *Foy v. Chicago, etc. Ry. Co.*, 63 Minn. 255, 65 N. W. 627; *Adams v. Blankenstein*, 2 Cal. 413, 56 A. D. 350.

⁵ *Rosenfeld v. Express Co.*, 1 Woods 131.

⁶ *Jellett v. St. Paul, etc. Ry. Co.*, 30 Minn. 265, 15 N. W. 237.

⁷ *Pierce v. So. Pac. Ry. Co.*, 120 Cal. 156, 47 Pac. 874, 40 L. R. A. 350; *Johnson v. N. Y. Cent. T. Co.*, 33 N. Y. 610, 88 A. D. 416; *S. D. Slavey Co. v. Union T. Co.*, 106 Wis. 394, 82 N. W. 285; *Am. Express Co. v. Lesem*, 39 Ill. 312; *Louisville, etc. Co. v. Hartwell*, 99 Ky. 436, 36 S. W. 183; *Railway Co. v. Odil*, 91 Tenn. 61, 33 S. W. 611; *McEwan v. Jeff. etc. Ry. Co.*, 33 Ind. 376; *Dana v. N. Y. Cent.*, 51 How. Pr. 430.

goods, they having been lost.¹ If the contract of the carrier receiving the goods for shipment provides that the goods shall be delivered at a point beyond the terminus of its own route, the damages for a loss or conversion are to be measured by the market value at the place of destination of the goods.² And in case of a deviation from instructions the damages allowable are not lessened by the fact that the goods were bought at a low price.³ In a case for the value of livestock shipped in which it was contended that certain specifications in the contract exempted the carrier from liability or at least changed the measure of recovery, the court said: "There was a deviation from the stipulated route, defendant carrier received the shipment at a point on its line different from the stipulated point. In the opinion of the writer, this deviation may affect any of the special contract exemptions from liability as an insurer in favor of the defendant as a common carrier, but such deviation does not affect the agreed value that was made of the livestock in consideration of a reduced freight rate, the injury having been caused by the negligence of the defendant. But a majority of the court upon the authority of the following cases, are of the opinion that the deviation abrogated every feature of the special contract of carriage, and that consequently the recovery for the stock that died because of the defendant's negligence should be their proven value and not their agreed value."⁴ So, it is said that where a carrier departs from the method of shipment of livestock specified in the contract and the shipper seeks to recover damages done to the horses, and not the value of them, even if trover is the only remedy, the amount recoverable is the value of the horses when converted, less their value when redelivered to plaintiff.⁵

§ 692. **Miscellaneous Property.** — It is a difficult matter to apply the general rule of recovery for a conversion to certain classes of property on account of the inability to arrive at their value. Of this character are deeds to realty. The question, however, has infrequently been before the courts. But it would seem that if the

¹ *Johnson v. N. Y. Cent. T. Co.*, *supra*.

² *Ruppel v. Alle. Val. Ry. Co.*, 167 Pa. St. 166, 31 Atl. 478, 46 A. S. R. 666; *Perkins v. Portland, etc. Ry. Co.*, 47 Me. 573, 74 A. D. 507; *MaGhee v. The Camden, etc. Ry. Co.*, 45 N. Y. 514, 6 A. R. 124.

³ *Cleveland, etc. Co. v. Schaefer*, 47 Ind. App. 371, 90 N. E. 502.

⁴ *Atl. Coast, etc. Co. v. Hinely-Stephens Company*, 64 Fla. 175, 60 So. 749, Ann. Cas. 1914B, 999, citing: *Waltham Mfg. Co. v. N. Y. & T. S. Co.*, 204 Mass. 253, 90 N. E. 550, 17 Ann. Cas. 837.

⁵ *McKahan et al. v. Am. Ex. Co.*, 209 Mass. 270, 95 N. E. 785, Ann. Cas. 1912B, 612, citing: *Ga. Ry. Co. v. Cole*, 68 Ga. 623; *Phillips v. Brigham*, 26 Ga. 617, 71 A. D. 227; *Robertson v. Nat'l S. Co.*, 139 N. Y. 416, 34 N. E. 1053; *Stewart v. Merchants' Co.*, 47 Ia. 229, 29 A. R. 476; *Merrick v. Webster*, 3 Mich. 268.

deed had been recorded so that plaintiff's title to the real estate thereby conveyed could not be interfered with, the plaintiff's injury would be only nominal; and at all events his damage could be no more than it would cost him to go into equity and have his title established.¹ But if the conversion of an instrument — such as a bond to convey — results in the loss of the land, the plaintiff's damage, it has been held, is to be measured by the value of the land, since the effect is to transfer the title to the defendant.² It has also been a difficult problem for the courts to arrive at the correct measure of recovery against one converting a policy of life insurance. It has been stated that in an action to recover for the conversion of a life insurance policy, the measure of damages is the present value of the benefit stated in the policy, less the value of premiums required to procure a similar policy on the same life calculated upon his expectancy of life, when the insured is in good health and his life insurable; but when he is not, this may be shown to reduce his expectancy, and it may also be shown by expert evidence that by reason of ill-health a greater rate of premium would be required to reimburse him on account of his shortened expectancy of life, and if, from a computation of the present value of the benefit and the present value of the premiums to be paid during the life, the value of the benefit is greater than the value of the premiums, the difference is the measure of damages for the conversion.³ This general rule, however, is upon the supposition that the policy is valid and in force; if void, the plaintiff can recover only nominal damages.⁴ Where the insured had died before the action for the conversion was brought, the measure of damages was held to be the face value of the policy less a premium which fell due before the insured's death.⁵ Where a pledgee of the policy had converted it, the damages accruing to the pledgor were measured by the value of the policy less the amount of the debt secured by the pledge.⁶ If the policy be already matured at the time of its conversion, the measure of damages is presumptively its face value.⁷

¹ *Mowry v. Wood*, 12 Wis. 413; *Edwards v. Dickinson*, 102 N. C. 519, 9 S. E. 456.

² *Clowes v. Hawley*, 12 Johns. 483.

³ *Barney v. Dudley*, 42 Kan. 212, 21 Pac. 1079, 16 A. S. R. 476, citing: *People v. Security L. I. Co.*, 78 N. Y. 114, 34 A. R. 522.

⁴ *Wills v. Wells*, 8 Taunt. 264.

⁵ *Toplitz v. Bauer*, 161 N. Y. 325, 57 N. E. 1059, 34 App. Div. 526, 55 N. Y. Supp. 29; *Hayes v. Mass. Mut. L. Ins. Co.*, 125 Ill. 626, 18 N. E. 322, 1 L. R. A. 303.

⁶ *Wheeler v. Pereles*, 43 Wis. 332; *Fisher v. Brown*, 104 Mass. 259; *Woodworth v. Hascall*, 59 Neb. 124, 80 N. W. 483.

⁷ *Mut. L. Ins. Co. v. Allen*, 212 Ill. 134, 72 N. E. 200; *Stafford v. Lang*, 25 R. I. 488, 59 Atl. 684.

15. SPECIAL DAMAGES

§ 693. **General Rule as to Special Damages.** — There are many instances in which the recovery of the actual or market value of converted property does not reimburse the owner for the full injury he has suffered. In such cases he may ordinarily show any special loss or damage that he has sustained. The cases are not in harmony as to the allowance of such special damages, and the rule is not clear as to what may and what may not be classed as special damages. The general measure which includes the recovery of interest is presumed to thus make allowance for many items going to make up the total loss which might otherwise be recoverable as special damages; accordingly, it is generally held that profits which might have been derived from the use of a chattel but for its conversion are not recoverable.¹ This, as will presently be seen from a consideration of the rule where property has been wrongfully seized under attachment or execution is not the unanimous decision of the courts; but on principle it should be in cases where there has been no return or recovery of the property itself. Where cows had been wrongfully taken from their owner, it was sought, in an action for their conversion, to recover for the loss of their calves and for milk which the cows produced after the conversion; but the court denied the recovery.² The underlying reason prohibiting the allowance of profits as a part of the damages to be recovered for a conversion is that such are too remote and speculative, and too many obstacles are presented against the certainty of their proof.³ Apparently contrary to this principle, however, it was held in a case where plumbing fixtures had been converted during the construction of a house that the owner could recover the rent of the building of which he had been deprived by reason of the conversion.⁴ A case in which the court very properly held the damages claimed entirely too remote for allowance was one for the conversion of a mortgaged horse, and the plaintiff sought to recover for suffering he endured from the cold while returning home. The court not only disallowed the damages in the particular action but remarked that they could not be allowed in any kind of action.⁵

¹ *Farmers Bank v. McKee*, 2 Pa. 318; *Wehle v. Haviland*, 69 N. Y. 448; *Miller v. Jannett*, 63 Tex. 82.

² *Drennen v. Charles*, 12 Pa. Super. Court 476.

³ *Williams v. Wood*, 55 Minn. 323, 56 N. W. 1066, following *Cushing v. Seymour*, 30 Minn. 310, 15 N. W. 249.

⁴ *Munroe v. Armstrong*, 179 Mass. 165, 60 N. E. 475. It is true, that in this case the amount of the rent was capable of more certain proof than in the case of ordinary profits; and the building was being erected solely for rental purposes.

⁵ *Hinson v. Smith*, 118 N. C. 503, 24 S. E. 541.

Neither can one recover for injury to his reputation or credit, as such is not a necessary and foreseen result of the conversion.¹ But where the defendant had taken possession of the premises on which the property was situated, it was held that plaintiff was entitled to recover the amount expended by him for rent in the meantime.² And the New Jersey court went even a greater length in its departure from sound principle in holding that for the conversion of a railway ticket the plaintiff could recover damages to feelings for the indignity of a public altercation with the conductor who took up the ticket.³ Damages for mental suffering were also allowed where plaintiff had been forcibly compelled by defendant to indorse and deliver to him a check in payment of a debt.⁴

§ 694. Where Property Wrongfully Seized under Attachment or Execution. — There are two classes of wrongful seizure of chattels under attachment or execution which will be considered here in arriving at the damages to be allowed to the successful plaintiff — one where the levy or seizure was merely wrongful, and the other where it was accompanied by malice. In the first of these cases, the plaintiff is entitled to receive only such sum as will compensate him for the injury done — that is, only actual damages.⁵ This necessarily excludes the allowance of a sum for an injury to credit or the loss of anticipated profits.⁶ “Where property of the plaintiff, consisting of a stock of goods in a store has been seized under executions which the defendants caused to be issued, acting in good faith and without malice or intent to oppress the plaintiff, and afterwards returned to the plaintiff or his assignee, the plaintiff having in the meantime made a voluntary assignment for the benefit of his creditors, the jury, in an action to recover for such seizure, should, in assessing the damages, be restricted to these items: 1. Interest on the value of the goods seized during the time they were held by the sheriff, or, at the option of the plaintiff, in lieu of such interest, the value of his business during that time; 2. Any depreciation in the value of the goods during that time; 3. Any expenses to which the plaintiff was put in obtaining a return of the goods, including what he was obliged

¹ *Downing v. Outerbridge*, 79 Fed. 931, 25 C. C. A. 244; *R. F. Scott Co. v. Kelly*, 14 Tex. Civ. App. 136, 36 S. W. 140.

² *Casey v. Ballou Banking Co.*, 98 Ia. 107, 67 N. W. 98.

³ *Harris v. Del. etc. Ry. Co.*, 77 N. J. L. 278, 72 Atl. 50.

⁴ *Bonelli v. Bowen*, 70 Miss. 142, 11 So. 791.

⁵ *Tynburg v. Cohen*, 76 Tex. 409; *Goodbar v. Lindsley*, 51 Ark. 380, 11 S. W. 577, 14 A. S. R. 54; *Nordhaus v. Peterson*, 54 Ia. 68; *Myers v. Farrell*, 47 Miss. 281; *Bloch v. Creditors*, 46 La. Ann. 133.

⁶ *Mitchell v. Harcourt*, 62 Ia. 349; *Pettit v. Mercer*, 8 B. Mon. 51; *Seattle Co. v. Haley*, 6 Wash. 302, 33 Pac. 650, 36 A. S. R. 156; *Trawick v. Martine-Brown Co.*, 79 Tex. 460; *Zinn v. Rice*, 161 Mass. 571.

to pay for costs in the illegal judgments, and the alleged sheriff's fees charged for executing the illegal executions, expenses to which he had been put by way of rent of the store and clerk's hire while the defendant was in possession of the store, and the money that he was compelled to expend for counsel and attorney's fees in the proceedings to set aside the illegal judgments and executions. But no damages should be allowed for any supposed loss of profits from the interruption of the plaintiff's business for any time after the goods were restored to him or his assignee, for any loss that happened to him by reason of his assignment, nor for injury to his feelings."¹ The foregoing is a statement of the general rule adhered to by a majority of the courts in cases where the levy, seizure or sale appears to be merely wrongful. If more than this be shown, if it appear that in addition the act was wanton, malicious or in bad faith and without probable cause, something more may be recovered by way of punishment to the wrong-doer. Under what circumstances exemplary damages may be allowed will be discussed in a later section, but in the present connection it may be said that if the seizure or sale of personalty was wrongfully made, and with a malicious intent to vex or oppress the owner and it does so result, the latter may recover from the wrong-doer not only his actual damages, but also such special damages as he may show to have occurred to his credit, business or feelings.²

§ 695. **Same Subject.** — But the above doctrine that loss of profits cannot be recovered for in the event of a wrongful seizure or sale of chattels under attachment or execution is not subscribed to by all courts. The Nebraska cases in particular cling tenaciously to the opposite rule. There it was said in an action by a merchant to recover damages for a wrongful attachment, he is entitled to recover for the depreciation in value of the property seized and the loss he has sustained by reason of the locking up of his store and the interruption of his business; and that he may also recover the loss

¹ *Anderson v. Sloane*, 72 Wis. 566, 40 N. W. 214, 7 A. S. R. 885, citing among others: *Bierbach v. Goodyear Rubber Co.*, 54 Wis. 208, 41 A. R. 19; *Masterton v. Mount Vernon*, 58 N. Y. 391; *Higgins v. Mansfield*, 62 Ala. 267; *Holliday v. Cohen*, 34 Ark. 707; *Heath v. Lent*, 1 Cal. 412; *Oviatt v. Pond*, 29 Conn. 479; *Water Lot Co. v. Leonard*, 30 Ga. 560; *Green v. Williams*, 45 Ill. 206; *Glass v. Garber*, 55 Ind. 336; *Lowenstein v. Monroe*, 55 Ia. 82; *Wash. Ice Co. v. Webster*, 62 Me. 341, 16 A. R. 462; *Boyd v. Brown*, 17 Pick. 453; *Simmer v. St. Paul*, 23 Minn. 408; *Cincinnati v. Evans*, 5 Ohio St. 594; *Bates v. Clark*, 95 U. S. 209; *Wallace v. Finberg*, 46 Tex. 36; *Weeks v. Prescott*, 53 Vt. 73.

² *State v. Thomas*, 19 Mo. 613, 61 A. D. 580; *Hurlbut v. Hardenbrook*, 85 Ia. 606; *Biering v. First Nat'l Bank*, 69 Tex. 599; *Bozeman v. Shaw*, 37 Ark. 161; *Durr v. Jackson*, 59 Ala. 203; *Campbell v. Chamberlain*, 10 Ia. 337. Of course, the cases cited under this section were not all brought as for a conversion; some were directly on the attachment bond; some in case for the injury; but the principle is the same.

of profits which may reasonably, naturally and ordinarily be expected to follow the closing up of his business. The court continued, relative to the admissibility of evidence as to loss of profits, etc.: "We think this testimony was all competent. It furnished a reasonably safe basis for determining whether Cook had been deprived of profits by this attachment proceeding and the amount of such profits. The measure of Cook's damages was all the loss he had sustained as the result of this wrongful attachment. If the goods, when returned, were worth less than when they were seized, the amount of that depreciation was one element of his damages. If, by reason of the locking up of his store and the attachment of his goods, Cook's business was interrupted and he was thereby deprived of profits which he would have made had the business not been interrupted, this loss of profits was another element of his damages; and, if the plaintiffs in error cannot be made to respond to Cook for all damages which he sustained as the result of this wrongful attachment, it is not because of the fact that under the law Cook is not entitled to these damages, but because of the inability of the courts to formulate any reasonably certain rule for their admeasurement.¹ Counsel for plaintiffs in error criticise somewhat the doctrine of this court making loss of profits in cases like the one at bar an element of damages. We think, however, the doctrine is a just and reasonable one, and one enforced by the courts generally. We think that a loss of profits is a result which may be reasonably, naturally and ordinarily expected to follow from the closing up of a merchant's place of business and the seizure of his goods."²

§ 696. **Expenses of Following or Recovering Chattels.** — Where an owner has been wrongfully deprived of his chattels and has recovered possession of them, but in such recovery has been necessarily put to expense, he is ordinarily entitled to such expenses against the wrong-doer;³ unless some statute preclude it.⁴ So, where the owner of converted property was compelled to pay out money to recover possession it was held that the sum so paid should be de-

¹ Citing: *Schile v. Brokhahus*, 80 N. Y. 614; *Goebel v. Hough*, 26 Minn. 252; *Shepard v. Milwaukee Gas Light Co.*, 15 Wis. 349, 70 A. D. 479; *Schars v. Barnd*, 27 Neb. 94; *Haverly v. Elliott*, 39 Neb. 201; *West. Union Co. v. Wilhelm*, 48 Neb. 910.

² *Kyd v. Cook*, 56 Neb. 71, 76 N. W. 524, 71 A. S. R. 661. On the general principle involved see: *Donnell v. Jones*, 13 Ala. 490, 48 A. D. 59; *British, etc. Co. v. Sibley*, 27 La. Ann. 191; *Hoge v. Norton*, 22 Kan. 275; *Riley v. Littlefield*, 84 Mich. 22; *Groat v. Gillespie*, 25 Wend. 383; *Schwartz v. Davis*, 90 Ia. 324; *Jones v. Lamon*, 92 Ga. 529; *Curry v. Catlin*, 12 Wash. 322.

³ *Chase v. Snow*, 52 Vt. 525; *Dennison v. Hyde*, 6 Conn. 508; *Coffman v. Buckhalter*, 98 Ill. App. 304; *Grier v. Ward*, 23 Ga. 145; *Bennett v. Lockwood*, 20 Wend. 223.

⁴ *Redington v. Numan*, 60 Cal. 632.

ducted from the value of the property recovered in estimating the damages for the conversion.¹ And where the conversion consisted of a wrongful sale for freight charges, the measure of damages was held to be not the value of the property, but the loss sustained by plaintiff in securing possession, over and above what was fairly due for freight.² But strange to say, it has been held that such necessary expenses could not be recovered where the conversion was by mistake,³ where such did not result in the actual recovery of the property,⁴ or the action was against an innocent purchaser.⁵ While the properly taxable costs of an action for conversion are recoverable, it is the general rule, independent of statute, that attorney's fees are not.⁶ And ordinarily the expenses of collateral actions cannot be recovered.⁷

§ 697. **Punitive Damages.** — While it has sometimes been held that it is never proper to award a plaintiff punitive or exemplary damages for a conversion,⁸ and that such damages especially should not be awarded where the property came rightfully to the possession of the defendant though the conversion consists of a wrongful and willful detention,⁹ but in a great many states, where there has been a willfully wrongful intermeddling with personal property with a malicious intent to deprive the owner of it or to unjustly oppress him in his enjoyment of it, so that a conversion thereby occurs, the owner may recover from the wrong-doer not only the actual damages sustained by him but in addition such amount as the jury determine should be assessed against the wrong-doer as a punishment for the vexation and oppression resulting from the conversion.¹⁰ So, where a mortgagee wrongfully seized and sold the mortgaged chattels, it

¹ *Merrill v. How*, 24 Me. 126.

² *Hunt v. Haskell*, 24 Me. 339, 41 A. D. 387. See: *Ewing v. Blount*, 20 Ala. 694; *Laughlin v. Barnes*, 76 Mo. App. 258; *Western Land Co. v. Hall*, 33 Fed. 236.

³ *Williams v. Deen*, 5 Tex. Civ. App. 575, 24 S. W. 536.

⁴ *Hall v. Younts*, 87 N. C. 285.

⁵ *Renfro v. Hughes*, 69 Ala. 581.

⁶ *Berry v. Ingalls*, 199 Mass. 77, 85 N. E. 191; *Park v. McDaniels*, 37 Vt. 594; *Fox v. Jones*, 39 La. Ann. 929, 3 So. 95. See, however, *Peckham Iron Co. v. Harper*, 41 Ohio St. 100; *Hynes v. Patterson*, 95 N. Y. 1.

⁷ *Sedgwick, Damages*, Vol. 1, § 226d. But where the action is for damages for wrongful seizure of goods under attachment, such expenses and attorney's fees may generally be recovered. Note to 68 A. S. R. 273.

⁸ *Peterson v. Gresham*, 25 Ark. 380; *Baldwin v. Porter*, 12 Conn. 473.

⁹ *Jones v. Rahilly*, 16 Minn. 283.

¹⁰ *Downing v. Outerbridge*, 79 Fed. 931, 25 C. C. A. 244; *Carey v. Bright*, 58 Pa. St. 70; *Carson v. Smith*, 133 Mo. 606, 34 S. W. 855; *Reamer v. Express Co.*, 93 Mo. App. 501, 67 S. W. 718; *Gensburg v. Field*, 104 Ia. 599, 74 N. W. 3; *Heard v. James*, 49 Miss. 236; *Wilde v. Hexter*, 50 Barb. 448; *Workheiser, etc. Co. v. Langford*, 51 Tex. Civ. App. 224, 115 S. W. 89; *Casey v. Ballou Banking Co.*, 98 Ia. 107, 67 N. W. 98; *Pribble v. Kent*, 10 Ind. 325, 71 A. D. 327; *Dibble v. Morris*, 26 Conn. 416; *Bonelli v. Bowen*, 70 Miss. 142, 11 So. 791; *Bates v. Callender*, 3 Dak. 256, 16 N. W. 506; *Kelly v. McDonald*, 39 Ark. 387; *Waller v. Waller*, 76 Ia. 513, 41 N. W. 307.

was held that exemplary damages could be recovered therefor.¹ But the evil intent or malice of the defendant must have been an element of the wrong, and if there was simply an irregular foreclosure of the mortgage and a sale thereunder, without intent to oppress the mortgagor but simply to recover the mortgage debt, such damages are not allowable. Even under a statute allowing the recovery of double damages by an administrator, he yet must show bad faith on the part of the defendant, and the mistake of the latter as to his rights will not be ground for such allowance.² But where an officer broke into plaintiff's house while she was absent in the neighborhood picking cotton, and under a writ of attachment against her husband removed everything therefrom, including all the furniture and household supplies, personal wearing apparel of plaintiff and other members of the family, including a bundle of clothes and shoes of her dead baby, and all of plaintiff's separate property, and removed all the chickens from the place, it was held that the jury was justified in awarding exemplary damages.³

16. MITIGATION OR REDUCTION OF DAMAGES

§ 698. **General Principles of Mitigation.** — Upon strict legal principles circumstances of a mitigating nature attending a conversion would ordinarily be inadmissible except upon a question of the allowance of punitive damages; but when no such issue is raised, the aim and end of an action for the conversion should be the reimbursement of the owner for the actual loss sustained by him on account of the wrong. And such being the case, it often happens that justice to the defendant demands the admission in evidence of matters which should not be received as an excuse for the conversion or the wrong by the defendant but merely as showing that the plaintiff has not suffered so great a loss as in fact would appear but for the admission of such matters.⁴

¹ *Casey v. Ballou Banking Co.*, 98 Ia. 107, 67 N. W. 98.

² *Springer v. Jenkins*, 47 Ore. 502, 84 Pac. 479; *Silverman v. McGrath*, 10 Ill. App. 413; *Carey v. Bright*, 58 Pa. St. 70; *Pennington v. Redman Co.*, 34 Utah 223, 97 Pac. 115.

³ *Sale v. Shipp*, (Okla. 1916), 160 Pac. 502, citing: *Western Union v. Reeves*, 34 Okla. 469, 126 Pac. 216; *Ft. S. & W. Ry. Co. v. Ford*, 34 Okla. 576, 126 Pac. 745, 41 L. R. A. (N. S.) 745. See, also: *Farrar v. Talley*, 68 Tex. 349; *Seattle Crockery Co. v. Haley*, 6 Wash. 302, 36 A. S. R. 156; *Chaffee v. Mackenzie*, 43 La. Ann. 1062; *Durr v. Jackson*, 59 Ala. 203; *Crymble v. Mulvaney*, 21 Col. 203; *Beyersdorf v. Sump*, 39 Minn. 495, 12 A. S. R. 678.

⁴ *Kyle v. Caravello*, 103 Ala. 150, 15 So. 527; *Williams v. Crum*, 27 Ala. 468; *Sharpe v. Graydon*, 90 Ind. 232; *Cook v. Loomis*, 26 Conn. 483; *Lovejoy v. Bank*, 5 N. D. 623, 67 N. W. 956; *Field v. Munster*, 11 Tex. Civ. App. 341, 32 S. W. 417; *Chamberlain v. Shaw*, 18 Pick. 278, 29 A. D. 586; *Sprague v. Brown*, 40 Wis. 620.

§ 699. **What may be Shown to Reduce Damages.** — In some states it is held that where the property converted has been actually applied to the use or benefit of the plaintiff, such may be shown in reduction of the damages to be allowed.¹ But this is contrary to principle and is not supported by the weight of authority, as the owner has the right to refuse to have his property so applied.² This is the rule, however, only where he does in fact refuse to have the property so applied. If he consents to, or acquiesces in the application, the amount of the benefit thus received may be shown in arriving at the actual damages he has sustained.³ An exception to this rule is in the case of seizure of the property under legal process and the application of it thereby to the benefit of the owner. Thus where the goods were seized by an officer while they were in the possession of the wrong-doer, under a writ against the owner, and later sold and the proceeds applied to payment of such owner's debt, it was held that the amount of the damages for the conversion should be reduced by the value of the goods without regard to what they sold for.⁴ But the rule is different where there has been a regular and lawful seizure, but an irregular sale. In such case, the measure of damages is the difference between the value of the goods and the amount paid on the plaintiff's debt, the damages accordingly being reduced by the amount so paid on the debt.⁵ Where the property converted was applied by the wrong-doer to the benefit of a third person against whom the plaintiff had a right to proceed for its recovery, but he does not in fact so proceed, the defendant cannot show such facts in mitigation of damages.⁶

§ 700. **Same Subject; Return and Acceptance of Property.** — The right of a converter of chattels to return them to the owner, and the effect of such return have in a measure been discussed in previous sections.⁷ A mere offer to return the property has no effect whatever upon the right of action or the amount of damages to be recovered,⁸

¹ *Prescott v. Wright*, 6 Mass. 20; *Ball v. Campbell*, 30 Kan. 177, 2 Pac. 165; *Dahill v. Booker*, 140 Mass. 308, 5 N. E. 496, 54 A. R. 465; *Stow v. Yarwood*, 14 Ill. 424.

² *Parham v. McMurray*, 32 Ark. 261; *East v. Pace*, 57 Ala. 521; *Sprague v. McKinzie*, 63 Barb. 60; *Torry v. Black*, 58 N. Y. 185; *Bringard v. Stellwagen*, 41 Mich. 54, 1 N. W. 909; *Miss Mills v. Meyer*, 83 Tex. 433, 18 S. W. 748; *Northrup v. McGill*, 27 Mich. 234; *Smith v. Anderson*, 70 Vt. 424, 41 Atl. 441; *Isaacs v. McClean*, 106 Mich. 79, 64 N. W. 2; *Wanamaker v. Bowes*, 36 Md. 42.

³ *Hendrickson v. Dwyer*, 70 N. J. L. 223, 57 Atl. 420.

⁴ *Squire v. Hollenbeck*, 9 Pick. 551, 20 A. D. 506; *Howard v. Cooper*, 45 N. H. 339; *Ball v. Liney*, 48 N. Y. 6, 7 A. R. 511; *Beyersdorf v. Sump*, 39 Minn. 495, 41 N. W. 101, 12 A. S. R. 678; *Lazarus v. Ely*, 45 Conn. 504.

⁵ *Cressey v. Parks*, 76 Me. 532; *Pierce v. Benjamin*, 14 Pick. 356, 25 A. D. 396; *Lamb v. Day*, 8 Vt. 407, 30 A. D. 479.

⁶ *First Nat'l Bank v. Lyman*, 59 Kan. 410 53, Pac. 125.

⁷ §§ 627, 628.

⁸ *Gilbert v. Peck*, 43 Mo. App. 577; *Greenthal v. Lincoln*, 68 Conn. 384, 36 Atl. 813; *Lyon v. Yates*, 52 Barb. 327; *Russell v. Cole*, 167 Mass. 6, 44 N. E. 1057, 57 A. S. R. 432. This is the rule by statute in Maine: *Brown v. Neal*, 36 Me. 407; *Wooley*

unless it be shown that the conversion was by mistake or inadvertence, in which case it is sometimes said that a tender of the property may be shown in mitigation if the property be in the same condition as when converted.¹ A different rule, of course obtains if the offer to return be accepted by the owner and he then resumes possession or control of the property. Such return and acceptance do not bar the right of action, but they may be shown in reduction or mitigation of damages.² The rule is the same where the property has been sold by the wrong-doer and the owner has accepted the proceeds of the sale.³ The acceptance by a part owner is sufficient to bind all co-owners and the damages will be reduced as if the one accepting the return were the sole owner.⁴ It does not matter that the acceptance was claimed to have been against the will of the plaintiff, the effect is the same.⁵ Where the property has been returned to and accepted by the plaintiff, the damages are thereby mitigated to the extent that his recovery will be limited to the difference in value of the property at the time of conversion and the time of its return,⁶ some courts, however, holding that the proper measure is the value of the use of the chattels during their detention.⁷ Where the action is brought by a lien-holder or the holder of some other special interest, and it appears that the property has been returned to and accepted by the general owner, such return and acceptance may be shown in mitigation.⁸

v. Carter, 7 N. J. L. 85, 11 A. D. 520; *Morgan v. Kidder*, 55 Vt. 367; *Norman v. Rogers*, 29 Ark. 365.

¹ *Gilbert v. Peck*, *supra*; *Ward v. Moffett*, 38 Mo. App. 395; *Colby v. Reed*, 99 U. S. 560, 25 L. Ed. 484.

² *Renfro v. Hughes*, 69 Ala. 581; *Bowman v. Teall*, 23 Wend. 306, 35 A. D. 551; *Gove v. Watson*, 61 N. H. 136; *King v. Franklin*, 132 Ala. 559, 31 So. 467; *Storrs v. Robinson*, 74 Conn. 443, 51 Atl. 135; *Seaboard, etc., Co. v. Phillips*, 108 Md. 285, 70 Atl. 232; *Gibbs v. Chase*, 10 Mass. 125; *Eldridge v. Holfer*, 45 Ore. 239, 77 Pac. 874; *Bodeya v. Perkerson*, 60 Ga. 516; *Owen v. Williams*, 38 Col. 79, 89 Pac. 778; *Cernahan v. Chrysler*, 107 Wis. 645, 83 N. W. 778; *McGraw v. Sampliner*, 107 Mich. 141, 64 N. W. 1060; *Aylesbury Co. v. Fitch*, 22 Okla. 479, 99 Pac. 1089, 23 L. R. A. (N. S.) 573; *Bates v. Clark*, 95 U. S. 204, 24 L. Ed. 471; *Western Land Co. v. Hall*, 33 Fed. 236.

³ *Ferguson v. Buchell*, 101 App. Div. 213, 91 N. Y. Supp. 724.

⁴ *Nightingale v. Scannell*, 18 Cal. 315.

⁵ *Sutton v. Great N. Ry. Co.*, 99 Minn. 376, 109 N. W. 815.

⁶ *Green v. Stevens*, 37 Mo. App. 641; *Clark v. Bates*, 1 Dak. 42, 46 N. W. 510; *Stillwell v. Farewell*, 64 Vt. 286, 24 Atl. 243; *Plummer v. Reeves*, 83 Ark. 10, 102 S. W. 376; *Rank v. Rank*, 5 Pa. St. 211; *Lucas v. Trumbull*, 15 Gray 306; *Prinz v. Moses*, 66 Pac. 1009 (Kan. 1901).

⁷ *Fields v. Williams*, 91 Ala. 502, 8 So. 349; *Curtis v. Ward*, 20 Conn. 204; *Hall v. Corcoran*, 107 Mass. 251; *Gove v. Watson*, 61 N. H. 136; *Bigelow Co. v. Heintze*, 53 N. J. L. 69, 21 Atl. 109; *Ingram v. Rankin*, 47 Wis. 406, 2 N. W. 755; *Hart v. Blake*, 31 Mich. 278; *Brewster v. Silliman*, 38 N. Y. 423; *Sparks v. Purdy*, 11 Mo. 219; *Barrelett v. Bellgard*, 71 Ill. 280.

⁸ *Huning v. Chavez*, 7 N. Mex. 128, 34 Pac. 44; *Bisson v. Joyce*, 66 N. H. 478, 30 Atl. 1120; *Aylesbury Mer. Co. v. Fitch*, 22 Okla. 475, 99 Pac. 1089, 23 L. R. A. (N. S.) 573.

CHAPTER XIII

TRIAL

§ 701. Questions for the court.	§ 705. Same subject.
§ 702. Permitting property to be brought into court.	§ 706. Province of jury.
§ 703. Instructions.	§ 707. Verdict and findings.
§ 704. Same subject.	§ 708. Judgment.
	§ 709. Effect of judgment.

§ 701. **Questions for the Court.** — The importance of some matters properly a part of the trial of an action of trover has merited a separate chapter for them in this work.¹ Further details of the trial will now be shown. It is elementary that questions of law are for the court, to be applied by the jury to the facts as established by the evidence. It must be remembered that the action is legal as distinguished from equitable, and it is not the province of the court to attempt to adjust equities between the parties.² The court has absolute control, within the limits of a sound discretion, and may determine the form in which evidence shall be introduced.³ And may permit evidence to be submitted out of its proper order,⁴ and may permit a party, after he has closed his case, to re-open it for the purpose of making further proof.⁵ So, the court may direct a non-suit against the plaintiff for failing to offer any evidence in support of one of the material allegations of the complaint.⁶ But a non-suit is erroneous where directed against a plaintiff for not offering proof of an immaterial matter, or proof of a material matter against an unnecessary party.⁷

§ 702. **Permitting Property to be brought into Court.** — The court also has power to permit the defendant, upon proper application, as by a motion which is addressed to the court's discretion, to

¹ See: Chap. XI, "Evidence;" and Chap. XII, "Measure of Damages."

² *Womble v. Leach*, 83 N. C. 84.

³ *New York Ins. Co. v. Allison*, 107 Fed. 179, 46 C. C. A. 229.

⁴ *Dodge v. Goodell*, 16 R. I. 48, 12 Atl. 236.

⁵ *Dexter v. Dexter*, 56 N. Y. Super. Ct. 568, 132 N. Y. 540, 30 N. E. 68.

⁶ *Brook v. Lowe*, 122 Ga. 358, 50 S. E. 146; *Rakestraw v. Floyd*, 54 S. C. 288, 32 S. E. 419.

⁷ *Howard v. Snelling*, 28 Ga. 469; *Scarboro v. Goethe*, 118 Ga. 543, 45 S. E. 413.

bring into court the property involved in the action, and tender same in mitigation of damages.¹ But the court of one state holds that a defendant in trover cannot return the property in mitigation of damages, where the taking was willful, and the property has been essentially injured, and where no rule for such return has been applied for.²

§ 703. **Instructions.** — It is not only the province, but it is the duty, of the court to instruct the jury fairly and fully upon the law as applicable to the facts submitted in any particular case in trover.³ But in the giving of instructions, the court must not invade the province of the jury, as such will be reversible error. Such invasion occurs if the court directs a verdict on the testimony of one witness when other witnesses have also testified about the same matter;⁴ directs the jury to give more weight to some evidence than to another part;⁵ assumes a fact to be proven, when there is a question as to the proof;⁶ or takes the case from the jury under the erroneous assumption that there was no evidence to support a verdict;⁷ and the court should not go to the extent of passing upon the sufficiency of the evidence submitted.⁸ But if the defect of the instruction does not affect a substantive right of the party, the fact that it is defective in form will not constitute reversible error.⁹ And, in order for a party to avail himself of an error in an instruction, it is often necessary that he should have called the trial court's attention to the error and demanded a correction.¹⁰ But a requested instruction should be refused where it is not justified by the evidence submitted¹¹ or if the court has covered the same ground in other instructions.¹²

¹ *Churchill v. Welsh*, 47 Wis. 39, 1 N. W. 398; *Ruthland Co. v. Middlebury Bank*, 32 Vt. 639; *Rogers v. Crombie*, 4 Me. 274.

² *Hart v. Skinner*, 16 Vt. 138, 42 A. D. 500.

³ *Bynum v. Gary*, 161 Ala. 140, 49 So. 757, 135 A. S. R. 121; *Lee v. McDonnell*, 31 Tex. Civ. App. 468, 72 S. W. 612; *Wamsley v. Atlas Co.*, 168 N. Y. 533, 61 N. E. 896, 85 A. S. R. 699; *Chappell v. Puget Sound Co.*, 27 Wash. 63, 67 Pac. 391, 91 A. S. R. 820.

⁴ *Weiserfield v. McLean*, 96 N. C. 248, 2 S. E. 56; *Browder v. Phinney*, 37 Wash. 70, 79 Pac. 598.

⁵ *Doll v. Hennessy Mer. Co.*, 33 Mont. 80, 81 Pac. 625.

⁶ *Benson v. Eli*, 16 Col. App. 492, 16 Pac. 450; *Bower v. Bower*, 97 Mo. App. 674, 71 S. W. 739; *Hudson v. Grocery Co.*, 105 Ala. 200, 16 So. 693.

⁷ *Kellogg v. Hamilton*, 10 So. 479 (Miss.).

⁸ *Doyle v. Burns*, 123 Ia. 488, 99 N. W. 195; *Reed v. Gould*, 93 Mich. 359, 53 N. W. 356.

⁹ *Hanaway v. Wiseman*, 39 Tex. Civ. App. 642, 88 S. W. 437; *Breeland v. Ritter*, 65 S. C. 480, 43 S. E. 960.

¹⁰ *Lovell v. Hammond Co.*, 66 Conn. 500, 34 Atl. 511; *Burke v. Holmes*, 80 S. W. 564 (Tex. Civ. App.).

¹¹ *Boxell v. Robinson*, 82 Minn. 26, 84 N. W. 635; *Knox v. Cook*, 119 Ga. 689, 46 S. E. 868; *Gray v. Eschen*, 125 Cal. 1, 57 Pac. 664; *Bennet v. Gilbert*, 194 Ill. 403, 62 N. E. 847.

¹² *Smith v. Hawley*, 14 S. D. 638, 86 N. W. 652; *Spaulding v. Jennings*, 173 Mass. 65, 53 N. E. 204.

§ 704. **Same Subject.** — The court should not charge the jury, in an action of trover, that a party is bound to sustain his allegation by proof which convinces beyond a reasonable doubt, as a preponderance of evidence is all that is required.¹ And, while the court should not instruct upon an immaterial matter, or upon a point which it is not necessary to prove — as upon a demand and refusal of possession where such are not material under the pleadings and evidence² — yet, as already pointed out, it is the duty of the court to charge the jury upon all issues as raised in the case. Under this rule, the following decisions have been made: Where the measure of damages may be affected by the motive, intention or good faith of the defendant the court should instruct as to the law thereto.³ If the issues raised by the allegations, or denials of the answer require proof as to the identity of the property involved, the court should tell the jury that the plaintiff must offer sufficient proof to identify the goods;⁴ and the jury must also be told that it is incumbent upon the plaintiff to establish his title and right of possession.⁵ One court has gone so far as to say that this instruction should be given even though the evidence on that point was uncontradicted.⁶ Of course, where there is evidence to that effect, the defendant is as much entitled to such an instruction as is the plaintiff.⁷

§ 705. **Same Subject.** — The jury should further be instructed that the plaintiff must show that the defendant converted the property,⁸ it being the further duty of the court to inform the jury whether evidence admitted of acts charged is sufficient, if believed by them, to amount to a conversion.⁹ It is of course incumbent upon the trial court to lay down for the jury rules which shall govern them in the particular case in assessing the amount of damages, if any, to be recovered by the plaintiff.¹⁰ These rules are to be constructed

¹ *Foo Long v. Chu Fong*, 6 N. Y. Supp. 406.

² *Williams v. McKissack*, 117 Ala. 441, 22 So. 489; *Dunham v. Converse*, 28 Wis. 306.

³ *Freeman v. Etter*, 21 Minn. 2; *Goodwin v. Sommer*, 49 Misc. 552, 97 N. Y. Supp. 960.

⁴ *Long v. Hall*, 97 N. C. 286, 2 S. E. 229.

⁵ *Forth v. Pursley*, 82 Ill. 152; *Hoffman v. Harrington*, 44 Mich. 183, 6 N. W. 225; *Cooley, Torts*, §52; *Jacobs v. Tolty*, 76 Tex. 343, 13 S. E. 372.

⁶ *Owens v. Weedman*, 82 Ill. 409; *Dudley v. Abner*, 52 Ala. 572; *Palmer v. McMaster*, 10 Mont. 390, 25 Pac. 1056; *Staples v. Smith*, 48 Me. 470.

⁷ *Nashville Ry. Co. v. Walley*, 41 So. 134 (Ala.).

⁸ *Greenleaf, Evidence*, 636-642.

⁹ *Kine v. Dale*, 14 Ill. App. 308; *Brickley v. Walker*, 68 Wis. 563, 32 N. W. 773; *Hill v. Hayes*, 38 Conn. 532; *Thompson v. Moesta*, 27 Mich. 182; *Col. Mill Co. v. Nat'l Bank*, 52 Minn. 224, 53 N. W. 1061; *Neder v. Jennings*, 28 Utah 271, 78 Pac. 482; *Pecha v. Kastle*, 64 Neb. 380, 89 N. W. 1047.

¹⁰ *Downing v. Outerbridge*, 79 Fed. 931, 25 C. C. A. 244; *Baker v. Wheeler*, 8 Wend. 505, 24 A. D. 66.

upon the law as declared in the chapter in this work on the "Measure of Damages," and the giving of an erroneous instruction as to the proper rule of recovery is reversible error,¹ as is also the submission of a question of exemplary damages when plaintiff's proof of actual damages has wholly failed.²

§ 706. **Province of Jury.** — As in all other actions, it is the rule in trover that disputed questions of fact must be passed on by the jury. And even where an allegation of damages was not controverted, and the defendant had defaulted, one court has held that the question of the amount of the damages must be passed on by the jury.³ But it has been elsewhere held that if the question of title be not gainsaid it is error to submit it to the jury.⁴ It is the rule, however, that, unless plaintiff's evidence of title has wholly failed⁵ it should be passed upon by the jury.⁶ And while it is the duty of the court to instruct the jury, in the light of the evidence in the particular case, as to what amounts to a conversion so as to authorize a recovery in trover,⁷ yet, once being informed as to this legal point, it is exclusively the business of the jury to say whether the facts admitted to them as evidence constitute such a conversion.⁸ So, the court should tell the jury when a demand and refusal of possession will be sufficient evidence of a conversion, leaving it for them to say whether the proof has amounted to this in the particular case before them.⁹ And the same is true where the motive and good faith of the defendant are involved,¹⁰ or the question whether plaintiff has waived the conversion,¹¹ the court first having informed the jury as to the law of waiver.

¹ *Banner Lumber Co. v. McDermott*, 128 Mo. App. 89, 106 S. W. 533.

² *Mulliner v. Shumake*, 55 S. W. 983 (Tex.).

³ *Abraham v. Alford*, 64 Ala. 281.

⁴ *Fullam v. Cummings*, 16 Vt. 697.

⁵ *Stewart v. Spedden*, 5 Md. 433.

⁶ *Blackmer v. Cleveland Ry. Co.*, 101 Mo. App. 557, 73 S. W. 913; *Prater v. Wilson*, 55 S. C. 468, 33 S. E. 561; *Rogers v. Dutton*, 182 Mass. 187, 65 N. E. 56; *Lawrence v. Wilson*, 64 N. Y. App. Div. 562; *Galler v. McMahon*, 51 Wash. 473, 99 Pac. 309; *Posay v. Gamble*, 157 Ala. 655, 47 So. 569; *Crerar v. Daniels*, 209 Ill. 296, 70 N. E. 569; *Thompson v. Andrews*, 53 N. C. 453.

⁷ *Speak v. Ely, etc. Co.*, 22 Mo. App. 122.

⁸ *Smith v. Bank*, 120 Mo. App. 527, 97 S. W. 247; *Hitson v. Hurb*, 45 Tex. Civ. App. 360, 101 S. W. 292; *Johnson v. Kelley*, 32 Ky. L. R. 701, 106 S. W. 864; *Duffus v. Bangs*, 122 N. Y. 423, 25 N. E. 980; *Ala. Cotton Co. v. Myrick*, 151 Ala. 626, 44 So. 587; *Seollard v. Brooks*, 170 Mass. 445, 59 N. W. 602; *Schultz v. Becker*, 131 Wis. 235, 110 N. W. 214; *Sutton v. Ry. Co.*, 99 Minn. 376, 109 N. W. 815; *Morris v. Bank*, 142 Fed. 25, 73 C. C. A. 211. These cases and others cited in 38 Cyc. 2106.

⁹ *Thompson v. Rose*, 16 Conn. 71, 41 A. D. 121; *Sturgis v. Keith*, 57 Ill. 451, 11 A. R. 28; *Towne v. Elevator Co.*, 8 N. D. 200, 77 N. W. 608; *Delahunty v. Hake*, 20 N. Y. App. Div. 430, 46 N. Y. Supp. 929; *Walcott v. Keith*, 22 N. H. 196; but see: *Knapp v. Bank*, 5 Dak. 378, 40 N. W. 587.

¹⁰ *Walker v. Wetherbee*, 65 N. H. 656, 23 Atl. 621; *Closson v. Morrison*, 47 N. H. 482, 93 A. D. 459.

¹¹ *Traynor v. Johnson*, 1 Head (Tenn.) 51.

§ 707. **Verdict and Findings.** — While a general verdict of guilty in an action of trover embraces by implication a finding in favor of the plaintiff upon the material issues made by the pleadings, and presupposes and comprehends a finding that plaintiff had a sufficient property interest in the goods, and that defendant converted them, yet the verdict must go further and assess the amount of plaintiff's damages. A failure in this respect will leave it insufficient.¹ But the verdict is sufficient if it find for plaintiff in a definite amount.² If there be two or more defendants, the general verdict may be for part and against the others;³ and a verdict in defendant's favor should be a simple statement of such finding without, of course, the assessment of any damages,⁴ while if there is any doubt whether the verdict responds to the issues, such doubt will be resolved in the affirmative.⁵ Yet if it is apparent that the finding is not within the issues the verdict will be held void.⁶ And the same is true if the verdict is not supported by the evidence.⁷ The finding, however, need not be specific as to any particular fact, though it be material, if it can be implied from the general finding.⁸

§ 708. **Judgment.** — The form of a judgment in trover in favor of the plaintiff should be simply for the recovery of damages, and not for the return of the property.⁹ An alternative judgment for damages or the recovery of the property is not allowed,¹⁰ except under statutory provision.¹¹ Whether the judgment be based on the findings of the court or jury, it must be in accordance with and supported by such findings, or held defective.¹² If the finding against defendants be for a joint conversion, the judgment must be joint in form.¹³

¹ *Baum Iron Co. v. Bank*, 50 Neb. 387; *Kean v. Zundelowitz*, 9 Tex. Civ. App. 350; *Ferrier v. Manning*, 25 Misc. (N. Y.) 531, 54 N. Y. Supp. 1019.

² *Hopkins v. Dipert*, 11 Okla. 630, 69 Pac. 883; *Troy v. Clark*, 30 Cal. 419; *United States v. Yukers*, 60 Fed. 641, 9 C. C. A. 171; *O'Neill Mfg. Co. v. Woodley*, 118 Ga. 114, 44 S. E. 980.

³ *Powers v. Sawyer*, 46 Me. 160; *Peacock v. Feaster*, 51 Fla. 269; *Walling v. Lewis*, 119 Ind. 496, 21 N. E. 1108.

⁴ *Delfendorff v. Hopkins*, 95 Cal. 343, 28 Pac. 265, 30 Pac. 549.

⁵ *Swortwoat v. Evans*, 37 Ill. 442.

⁶ *Taylor v. Bowen*, 52 N. Y. App. Div. 126, 65 N. Y. Supp. 36.

⁷ *Bernstein v. Walker*, 25 Ill. App. 224; *Gardner v. Baer*, 26 Misc. 181, 56 N. Y. Supp. 1096.

⁸ *Mathew v. Mathew*, 138 Cal. 334, 71 Pac. 344.

⁹ *Kyle v. Caravello*, 103 Ala. 150, 15 So. 527; *Stephens v. Koonce*, 103 N. C. 266, 9 S. E. 315; *Gauche v. Milbrath*, 94 Wis. 674; *Polk v. Allen*, 19 Mo. 467.

¹⁰ *Kern v. Woolsey*, 34 Ill. App. 551; *Stephens v. Koonce*, *supra*; *Seymour v. Van Curen*, 18 How. Pr. 94.

¹¹ *Marshall v. Livingston*, 77 Ga. 21; *Capewood v. Taylor*, 7 Port. (Ala.) 33.

¹² *Walley v. Deseret Bank*, 14 Utah 305; *Hews v. Wall*, 27 Ill. App. 445; *Mitchell v. Printup*, 19 Ga. 579.

¹³ *Gerrish v. Cummings*, 4 Cush. 391. See: *Crenshaw v. Smith*, 10 Heisk. (Tenn.) 1.

§ 709. **Effect of Judgment.** — As to the effect of a judgment in trover, Judge Cooley, in his work on Torts,¹ says: "It was decided in *Adams v. Broughton* Stra. 1078; s. c., *Andrews*, 18, that judgment in trover or trespass for the value of the property vested the title in the defendant; and this decision has been followed in this country to some extent.² But the present English rule is, that it is not the judgment alone, but judgment and the satisfaction thereof, that passes the title to the defendant,³ and this may be said to be the accepted doctrine in this country at the present time.⁴ The title by relation vests as of the time when the conversion took place; but this relation is not effectual for all purposes; it could not render a third party a trespasser upon the rights of the defendant for anything done by him intermediate the conversion and the judgment;⁵ and if, after conversion, the plaintiff has sold his interest in the property, the purchaser will not be affected by the suit, and the plaintiff will be entitled to recover nominal damages only, since, by the sale, he has disabled himself from passing title to the defendant.⁶ And in neither trover nor trespass will the title be changed if the recovery was only for an injury to the property, or for a temporary use, and not for the value." And in further support of the doctrine that title to the property is vested in defendant only when the judgment is satisfied in full, see the later cases in the note below.⁷

¹ P. 537.

² *Carlisle v. Burley*, 3 Me. 250; *Rogers v. Moore*, Rice (S. C.) 90; *Bogan v. Wilburn*, 1 Speers, 179; *Floyd v. Browne*, 1 Rawle 121; *Marsh v. Pier*, 4 Rawle 273; *Fox v. Northern Liberties*, 3 Watts & S. 103; *Merrick's Estate*, 5 W. & S. 9; *Curtis v. Groat*, 6 Johns. 168; *Fox v. Pritchett*, 34 N. J. 13.

³ *Brinsmead v. Harrison*, L. R. 6 C. P. 584.

⁴ *Lovejoy v. Murray*, 3 Wall. 1; *Elliott v. Hayden*, 104 Mass. 180; *United Society v. Underwood*, 11 Bush. 265, 21 A. R. 214; *Smith v. Smith*, 51 N. H. 571; *Hyde v. Noble*, 13 N. H. 494; *Bell v. Perry*, 43 Ia. 368; *Bacon v. Kimmell*, 14 Mich. 201; *Atwater v. Tupper*, 45 Conn. 144; *Thayer v. Manley*, 73 N. Y. 305.

⁵ *Bacon v. Kimmel*, 14 Mich. 201. See *ante*, §§ 95, 96.

⁶ *Brady v. Whitney*, 24 Mich. 154.

⁷ *Thompson v. Toland*, 48 Cal. 99; *Frick v. Davis*, 80 Ga. 482, 5 S. E. 498; *Hepburn v. Sewell*, 5 Harr. & J. 211, 9 A. D. 512; *John A. Tolman Co. v. Waite*, 119 Mich. 341, 87 N. W. 124, 75 A. S. R. 400; *Haas v. Sackett*, 40 Minn. 53, 41 N. W. 237, 2 L. R. A. 449; *Singer Mfg. Co. v. Skillman*, 52 N. J. L. 263, 19 Atl. 260; *Pryor v. Ports, mouth Cattle Co.*, 6 N. M. 44, 27 Pac. 327; *Acheson v. Miller*, 2 Ohio St. 203, 59 A. D. 663; *St. Louis, etc. R. Co. v. McKinsey*, 78 Tex. 298, 22 A. S. R. 54; *Union Pac. R. Co. v. Schiff*, 78 Fed. 216.

CHAPTER XIV

APPEAL AND ERROR

§ 710. THE same rules of practice and procedure apply in appeals from judgments rendered in trover as obtain in other civil cases. As a predicate for such appeal or writ or error, proper objection must be made in the trial court to the action complained of and by the party deeming himself aggrieved, and upon the overruling of such objection, a proper and timely exception must be taken thereto; for without such objection and exception, the right of the party to make complaint in the appellate court will be deemed waived and therefore denied by the court.¹ Even though proper objection has been made in the lower court, the judgment will not be reversed for any error of the trial court unless such was material and prejudicial to the appellant,² and, of course, a new trial will not be ordered or a judgment reversed, if the question upon which complaint is made was determined by the jury on conflicting evidence,³ but if the evidence is insufficient to sustain the judgment, the case will be reversed;⁴ as where the evidence did not show that defendant had ever controlled the property.⁵ And the same result follows if the amount of the damages assessed be either too small,⁶ or too great.⁷

¹ Bowers on Waiver, §§ 426 *et seq.*

² *Mortimer v. Marder*, 93 Cal. 172, 28 Pac. 814; *Bryant v. Pugh*, 86 Ga. 525, 12 S. E. 927; *Luce v. Moorehead*, 73 Ia. 498, 35 N. W. 598, 5 A. S. R. 695; *Blaisdell v. Scally*, 84 Mich. 149, 47 N. W. 585; *Nininger v. Banning*, 7 Minn. 274; *Krewson v. Purdon*, 15 Ore. 589, 16 Pac. 480; *Land v. Klein*, 21 Tex. Civ. App. 3, 50 S. W. 638.

³ *Sutton v. Green*, 51 Mich. 118, 16 N. W. 259.

⁴ *New Jersey Mfg. Co. v. Barth*, 33 Misc. 784, 67 N. Y. Supp. 1078.

⁵ *Goldberg v. Shapiro*, 32 Misc. 724, 66 N. Y. Supp. 313.

⁶ *Watson v. Harmon*, 85 Mo. 443.

⁷ *Morris v. Thompson*, 1 Rich. 665.

INDEX

(References are to sections)

ACCEPTANCE :

return of property and acceptance, 700

ACCESSION :

meaning of, 281, 282
conversion through, 282, 283
trover for, 285
title acquired under, 286

ACCOUNT BOOKS :

conversion of, 38

ADMINISTRATORS: (See: Executors and Administrators)

ADMISSIONS :

in answer, 554
inconsistent with general denial, 554
of defendant, as evidence, 606

AEROLITE :

conversion of, 34
trover for, 416

AGENT; AGENTS :

liability of principal for acts of, 52
liable in trover for conversion, 54, 55, 56
 for conversion of principal's property, 61
corporations liable for acts of, 131
of corporations, transferring stock to self, 134
of municipality, liability for acts of, 158, et seq.
of municipality, acts of in good faith, 165
 respondeat superior, 169
 when municipality agent of state, 171
each partner is, of others, 192
purchasers from, 242, 245, 249
demand on, when necessary, 360
 receiving money for principal, 361, 388
 denying agency, 361
demand by, 366

INDEX

(References are to sections)

AGENT; AGENTS — Continued

- demand on, as demand on principal, 368-382
- trover by, 387, et seq.
- wrongful pledge by, 420

AGISTER:

- unauthorized use of horse by, 36
- claiming lien when none exists, 311
- may maintain trover, 429

AIDING OR ABETTING:

- conversion by, 306, 307
- receiving benefits, 306
- procuring receiver, 307

AMENDMENT:

- of complaint, 523
- of answer, 555
- court's discretion in, 555

ANIMALS:

- conversion of, 35
- wild, must be appropriated, 35
- conversion of bailed, 79, et seq.

ANSWER:

- admissions in as waiver of demand, 339
 - showing demand useless, 339
- general denial in, 527-8, 532, 541
- special plea, 527, 538, 539
 - is confession and avoidance, 527, 539
- pleading statute of limitations, 527
- general issue, 528
- new matter, 528, et seq.
- plea of "not guilty" in, 531
- counter-claim in, 531
- plaintiff's title attacked under general denial, 532
 - or act of conversion, 534
 - value and damages, 536
- special defenses in, 538, 539
 - what may be, 538
- disclaimer in, what is, 538
- plea of justification, 540, 542, 552
 - waiver, estoppel or ratification, 543
 - res adjudicata, 546
- set-off or counter-claim, 547
 - matters in mitigation, 550, 551
 - statute of limitations, 553
- admissions in, 554
- amendment of, 555
- reply to, 556

INDEX

(References are to sections)

APPEAL AND ERROR:

- basis for must be laid, 672
- objection and exception in lower court, 672
- no reversal for immaterial error, 672
- reversal where evidence insufficient, 672

APPROPRIATION:

- need not be, to use of defendant, 2
- by co-tenant, 219, et seq.
- evidence of, 625

ASSAULT:

- taking money by, conversion, 17

ASSENT:

- of owner to use of property, no conversion, 10
- of partner, to tort of other partner, 194
- title derived only by, of owner, 237

ASSESSMENT:

- of stockholders, sale of stock for unpaid, 150

ASSIGNEE; ASSIGNEES:

- trover by, 350, 469
- when demand by, necessary, 350
- of commercial paper, trover by, 397
- trover by, of bankrupt, 429
- of right of action in trover, 429, 469

ASSIGNMENT:

- of cause of action in trover, 429, 469
 - action by assignee, 470
- during pendency of suit, 471

ASSUMPSIT:

- waiver of tort, to sue in, 559, et seq.
- suing in, as waiver, 574
- whether property first sold, 574
- theory that property must be sold, 575, et seq.
 - contra, 580, et seq.

ATTACHMENT:

- wrongful, 66
- person directing wrongful, 67
- of mortgaged property, 128
- trover by mortgagor for wrongful, 397
- officer levying, may maintain trover, 404
- possession of officer under, sufficient, 406
- receptor of, to officer, 406
- by two officers at same time, 408
- wrongful, damages for, 694, et seq.

ATTORNEY: (See: Lawyer)

INDEX

(References are to sections)

AUCTIONEER :

- sale by, of stolen goods, 40, 59
- of goods obtained by fraud, 60
- of mortgaged goods, 125

BAILEE ; BAILEES :

- duties of, 79
- violation of contract, 79
- intention of, when governs, 79, 81
- changing nature of property, 79
- mis-use of property by, 80
- infant, liable, 83
- wrongful sale by, 84, 85, 309
- wrongful delivery by, 86, 87, 88
- not liable if property taken by officer, 89
- liability of, under void contract, 90
- failure or refusal to deliver property, 91, 92
- no power to comply with demand, 93
- carriers are, 95
- liabilities of partners as, 200
- unauthorized sale by, 238
 - purchasers at, 238
- acting as mere conduit, 303
- pledging property for own debt, 308
- using property contrary to bailment, 308
- demand on for possession, when, 325, 354
 - impossible to re-deliver, 354
 - where property sold, 355
- borrower of article, 356
- trover by, 394, et seq.
- has special property, 394
- trover by, against bailor, 395

BAILOR :

- demand by, upon carrier, 100
- assent by, to use of property, 310
- demand by, on bailee, when necessary, 354, 355
- trover by, 394, et seq.
- trover by, against bailee, 395
 - against third persons, 396
 - against purchaser from bailee, 396

BANK BOOK :

- conversion of, 38

BANKS :

- conversion of "special deposits," 155
- treating special deposit as general fund, 309

BILL OF LADING :

- carrier protected by production of, 105

(References are to sections)

BILL OF LADING — Continued

- is representative of the goods shipped, 105
- endorsement of, equivalent to delivery, 105
- property to be delivered to transferee of, 106
- third person advancing money upon, 106
- issued upon stolen shipping receipts, 107
- non-payment of draft drawn against, 107

BILLS AND NOTES:

- trover for, 19, 20
- refusal of payee to surrender after payment, 19
- refusal of pledgee to return, 19
- no conversion if consideration for illegal, 20
- sale of stolen, 41
- surrender of note by co-tenant, 226, 308, 309
- purchaser of stolen, 253
- holder of may sue for conversion, 399
- assignee of, right to action, 399
- lost, trover for, 415
- finder of, action by, 415
- stolen, trover for, 418

BURDEN OF PROOF:

- on carrier, to show rightful delivery, 108
- as to title, 594
- special interest, 596
- possession, 598
- miscellaneous instances as to, 601
- where money embezzled, 601

BY-LAWS:

- of corporation, notice of to transferee, 139, 141
- transfer of shares according to, 143

CARRIERS:

- are bailees, 95
- must carry what is offered, 95
- must carry over route designated, 97
- deviation constitutes conversion, 97
- failure or refusal to deliver goods, 98, 99
- non-delivery by, no conversion, 98
- non-delivery of stolen goods, 98
- delivery to consignee before demand by bailor, 100
- withholding from bailor, 100
- demand upon, by one other than consignor, 101
- caveat emptor applies to, 101, 102, 116
- qualified refusal to deliver, 103
- wrongful delivery by, 105, 106, 107
- mistake in delivery, 105
- refusing production of bill of lading, 105

INDEX

(References are to sections)

CARRIERS — Continued

- delivery without payment of attached draft, 107
- what is wrongful delivery by, 108
- burden of proof on, to show delivery, 108
- fault of consignor excuse for mis-delivery, 109, 112
- whether fraud practiced on, excuses delivery, 110
- delivery according to custom, 113
- payment of freight to, prior to trover, 114, 116
- has lien on goods for freight, 114
- refusing to deliver without payment of extra sum, 115
- surrender of goods under legal process, 118
 - must be fair on its face, 119, 120
 - collusion of carrier in proceedings, 120
- must give notice to owner of seizure under process, 121
- delay in delivery, no conversion by, 122
- illegal sale by, for charges, 291
- measure of damages against, 689, et seq.
 - wrongful delivery, 690
 - deviation from route, 691

CAUSES OF ACTION:

- joinder of, 519, et seq.
- splitting of, 522, 592
- amendment must not state new, 523

CAVEAT EMPTOR:

- doctrine of, applied to carriers, 101, 102, 116
- applied to purchasers of chattels, 240, 243
- in case of stolen property, 253

CHECKS:

- may be subject of conversion, 19

COLLATERAL SECURITY:

- conversion of, 43, 44
 - by refusal to return, 44
 - by wrongful surrender, 44, 309
 - by wrongful sale, 45, 46
- holder of may bring trover, 399
- measure of damages for, 685

COMMERCIAL PAPER: (See: Bills and Notes)

COMPLAINT; DECLARATION; OR PETITION:

- requirements of, in trover, 454, et seq.
- must allege jurisdictional matters, 466
- failing to show venue, 467
- plaintiff in, 468, et seq.
- must have definite theory, 487
- must contain common-law requirements, 487, 488
- must allege title and possession of plaintiff, 490

INDEX

(References are to sections)

COMPLAINT; DECLARATION; OR PETITION — Continued

- should not aver details of title, 491
- nor legal conclusions, 491
- must describe property, 494
 - what sufficient, 495
 - schedule attached to, 495
- must allege value and damage, 499
 - demurrer for failure to, 499
 - proper allegation of, 500
 - special damages, 501
 - exemplary damages, 501
 - double damages, 501
- must allege act of conversion, 502
 - by whom committed, 503
- whether partnership to be alleged, 504
- against two or more, 504
- alleging manner of conversion, 505, 510
 - sufficiency of, 506
 - may recite details, 507
 - need not allege fraud, 508
- must allege malice, 509
- alleging conditions precedent, 511
- need not allege demand and refusal, 512, et seq.
- necessity of alleging time of conversion, 518
- joinder of causes of action in, 519, et seq.
- splitting of causes of action in, 522
- amendment of, 523, et seq.
- demurrer to, 526
- reply must be consistent with, 558

CONDITIONS PRECEDENT:

- pleading performance of, 511
- indictment or acquittal of defendant, 612

CONDITIONAL SALES:

- purchasers from vendees in, 246
- contract of, 246, 247
- vendor in, re-taking property, 287
- purchasers from vendees in, demand on, 349
- measure of damages under, 686

CONFESSION AND AVOIDANCE:

- special plea is, 527
- recoupment as, 638, et seq.

CONFUSION OF GOODS:

- what is, 269, 270
- creates relation of co-tenants, 271
- by wrongful act, 274
- trover for, 274, 275
- intent in, 279

INDEX

(References are to sections)

CONFUSION OF GOODS — Continued

- demand for possession in case of, 338
- measure of damages for, 679
- effect of good faith, 679
- gas or oil intermingled, 680

CONTRACT :

- breach of by hirer of horse, 36, 37
- as to pledged property governs, 72
- violation of by bailee, 79, 83
- of infant bailee, 83
- of bailment, ended by conversion, 84. 85
- void, of bailment, 89
- conversion by breach of, 97
- conditional sale, 246, 247
- of infants, 255, 256
- breach of does not support trover, 322
- possession obtained under, 333

CONVERSION :

- what is, 1
- is offense against possession, 2, 9
- manual taking not necessary, 2, 28
- none, where only kindness to owner intended, 3
- none, in act consistent with owner's rights, 3
- intent in, usually immaterial, 4
- may be, even in case of mistake, 4
- of letter, by wrongful sending, 4
- intent sometimes material in, 5, 6, 7
- mistake may excuse, 6
- none, unless possession or title interfered with, 7
- intent in, as bearing on measure of damages, 8
- of horse, by wrongful use, 9
- must be wrongful act in, 10
- must be without owner's assent, 10
- trover is remedy for, 11
- force not necessary in, 12
- venue in action for, 15
- of money, 16, 17
- by administrator mingling funds, 17
- taking money by assault, 17
 - or robbery, 17
- none where defendant interest in property, 18
- attorney liable for money collected, 18
- of bills, notes or checks, 19
- by pledgee, refusing to return pledged note, 19, 69
- of shares of stock, 21, 22
- by wrongful sale or issue of stock, 22
- of muniments of title, 23
- of deeds, 23

(References are to sections)

CONVERSION — Continued

- not of judgments or records, 24
- of buildings, 25
- of fixtures, 25
 - placed by tenant, 26
 - agreement for removal, 27
- of crops, 28
- by landlord, of tenant's share, 28, 29
- of timber, 31, 32
- of rock, gravel and ore, 33
- of aerolites, 34
- of animals, 35, 36
- of geese, 35
- by agister, by unauthorized use of horse, 36
- by infant, 37
- of mail, 38
- of insurance policy, 38
- of bank book, 38
- of account books, 38
- by auctioneer, selling stolen goods, 40
- of collateral security and pledged property, 43, 44, 48
- waiver of, of pledged property, 49
- by principal, 52
- by agent, 54, 55, 56
- by brokers and factors, 57, 58
- by auctioneers, 59
- by officers, 64, 65
- by bailees, 79, et seq.
- under void contract of bailment, 90
- by bailee failing or refusing to deliver property, 91
- by demand and refusal of possession, 91
- demand by one without title, 93
- executor or administrator not liable for, 94
- by carrier deviating from route, 97
- by breach of contract, 97
- by failure of carrier to deliver goods, 98, 99
- none, in qualified refusal of carrier to deliver, 103
- by wrongful delivery by carrier, 105, 107, 108
- refusing delivery without payment of extra charge, 115
- surrendering goods under legal process, 118
- process must be fair on its face, 119, 120
- miscellaneous instances of, by carriers, 122
- by cartman, 122
- by mortgagor, 123, 124
 - refusing to surrender possession, 123
- by officer selling mortgaged property, 125, 126
- by purchaser of mortgaged property, 128
- by junior mortgagee, 128
- by landlord, 128

INDEX

(References are to sections)

CONVERSION — Continued

- against assignee of mortgage, 128
- by mortgagee, against mortgagor, 129, 268
- irregular sale by mortgagee, 130, 268
- by corporations, 131, et seq.
- of "shares" or "certificates," 144, 145, 146, 147
- of trust property, by corporation, 153
- by sale of stock held in trust, 154
- of special deposits, 155
- by municipal corporations, 156, et seq.; 177, et seq.
 - abatement of nuisances, 180
 - removing structures to prevent fire, 185
- in behalf of partnership, 193, 194
- demand and refusal by partnership, 197
- by partner, must be within scope of business, 202
- by co-tenant, 206
 - only by destruction of property, 207
 - sale by one, 208
 - amounts to destruction, 210
 - sale of entire crop, 213, 218
 - denial of this rule, 215, et seq.
 - destruction of property, 219
 - removal of property, 224, 225
 - loss of property through fault of, 226
 - refusing to segregate property, 228
 - mis-using property, 229
 - changing form of property, 230
 - excluding one from possession, 232
- by purchaser from unauthorized vendor, 234
 - from pledgees and bailees, 238
 - from co-tenant, 241
 - from conditional vendees, 246
 - from fraudulent vendees, 248
 - of stolen property, 252, et seq.
 - negotiable instruments, 253
- by infants, 255, 256
- wrongful taking as element in, 257, et seq.
 - by fraud, 259, 291
 - under legal process, 261
- through confusion of goods, 274
- under principle of accession, 282, et seq.
- by vendor re-taking property, 287
- by wrongful sale, 289, 290
- by assumption of ownership, 292, et seq.
- actual or constructive possession in wrong-doer, 298
- by words, 298
- by destruction of property, 293, 299
- by aiding or abetting wrong-doer, 306
- resisting owner's attempt to get possession, 307

(References are to sections)

CONVERSION — Continued

- by wrongful use, 308
- by claiming lien when none exists, 311
- detention for lien, 312
- by wrongful detention, 313
- by words without acts, 314
- by threatening owner with violence, 315
- none through negligence, 317
- miscellaneous acts of, 321
- none from breach of contract, 322
- does not occur between debtor and creditor, 322
- when demand and refusal constitute, 323
- claiming property under void sale, 327
- obtaining possession through duress, 328
- by tax collector, illegal sale, 328
- by servant taking master's goods, 328
- through mistake or fraud, 329
- by taking property under reversed judgment, 334
- demand and refusal by officer, 341
- by wrongful purchaser, 343, 345, 346, 347
- when demand and refusal evidence of, 374
 - when insufficient, 377
- officer liable to pledgee for, when, 393
- by bailee, 395
- by mortgagor, 398
- of commercial paper, 399
- right of action for, assignable, 429
- jurisdiction in action for, 456, et seq.
- of goods in foreign state, 457, 459
- act of must be pleaded, 502
- manner of, allegation as to, 505, 510
 - sufficiency of, 506
 - may recite details, 507
- by wrongful taking, 510
- time of, alleging, 518
- denial of, in answer, 532, 534
- justification of, 540
- waiver of right to sue for, 563, et seq., 580
- ratification of, 570
- effect of waiver of, 589, et seq.
- measure of damages for, 630, et seq.
 - as of what time, 649, et seq.

CORPORATIONS:

- conversion of shares in, 21, 678, 688
 - by pledgee, 21, 22
- wrongful sale of shares, 22
- conversion by, 131
- liable for acts of agents, 131

INDEX

(References are to sections)

CORPORATIONS — Continued

- ultra vires acts of, 131
- wrongful transfer of shares by, 22, 132, et seq.
- agent of, transferring shares to himself, 134
- liable for transferring shares by mistake, 135
- refusing to enter name of transferee, 136, 137
- have lien against shares for indebtedness, 138, 139
- by-laws of, notice to transferee, 139, 141
- certificate reciting stock fully paid, 142
- refusing to issue stock, 22, 143
- conversion of "shares" or "certificates," 144, 145
- sale of stock in, for unpaid assessments, 150
- conversion by, of trust property, 153
 - of special deposits, 155
- municipal, torts of, 156, et seq.
- demand on, for possession, 369
- measure of damages for, 687

CO-TENANT; CO-TENANTS:

- trover by one against another, 206
- each is entitled to possession, 206
- formerly, only destruction by amounted to conversion, 207
- sale of property by one, 208
- amounts of destruction, 210, 218
 - of crops, 213
 - denial of this rule, 215, et seq.
- destruction of property by one, 219
 - need not be physical, 219
 - exclusive possession amounting to, 220
- removal of property by, no conversion, 222
 - contrary rule, 224, 225
- loss of property through fault of, 226
 - surrendering note to make, 226
 - changing personalty to realty, 227
- refusing to segregate property, 228
- mis-use of property by, 229
- changing form of property, 230
- excluding co-owner from possession, 232
- trover against vendee of, 232
- purchasers from, 241
- confusion of goods creates relation, 271
- demand on, when necessary, 358
 - as between themselves, 359
- trover by, when, 384
- waiver of tort by, 568
- damages as between, 637

COUNTER-CLAIM; SET-OFF:

- pleading, 531
- must be specially pleaded, 547

(References are to sections)

COURT; COURTS:

trover for goods in custody of, 456
 of state, jurisdiction of in trover, 457
 of justice of the peace, jurisdiction, 460
 federal, jurisdiction, 462
 questions for, in trover, 663
 cannot adjust equities, 663
 controls trial, 663
 may direct non-suit, 663
 property restored by permission of, 664
 duty to instruct jury, 665
 must tell jury what conversion is, 668
 judgment of, 670

CROPS:

conversion of, 28
 whether real or personal property, 28
 conversion of tenant's share by landlord, 28, 29
 purchase of, as a conversion, 30, 401
 wrongful sale of, by mortgagor, 125
 wrongful possession by landlord, 128, 425, 426
 sale of entire, by one co-tenant, 213, 218
 denial of the rule, 215, et seq.
 removal of by co-tenant, 224, 225
 co-tenant denying interest of others, 228
 removal by trespasser, 295
 destruction of by defendant's cattle, 336

CUSTOM:

delivery by carrier according to, 113
 must be brought to knowledge of consignor, 113

DAMAGES:

measure of, intent bearing on, 8
 for conversion of trees, 31, 32
 complaint must allege, 499
 whether material, 499
 can recover only damages alleged, 500
 special, must be alleged, 501
 also exemplary, 501
 and double, 501
 malice, as affecting, 509
 attacking, under general denial, 536
 matters in mitigation to be pleaded, 550, 551
 intent as affecting, 608
 nominal, where property restored, 628
 general rule as to measure of, 630, et seq.
 value with interest is basis of, 630, 648, 666
 market value ordinarily governs, 630, 642, et seq.
 at time of conversion, 630, 631

INDEX

(References are to sections)

DAMAGES — Continued

general rule as to measure of — Continued

where conversion accidental or by mistake, 631

where conversion willful, 631

for property never in existence, 632

must be proximate result of conversion, 633

amount for which property sold, 633

for conversion of special interest, 634, et seq.

against stranger to the title, 634

for trustee property, 634

suit by officer, 635

by lienholder, 635

by conditional vendor, 636

by lender of chattels, 636

possession sufficient special interest, 636

between co-tenants, 637

recoupment against owner of special interest, 638

goes in mitigation, 638

what is, 638

when allowed, 639, 640

deducting amount due defendant, 641

market value, how far governs, 642, et seq.

how determined, 643

auction sales, 643

wholesale or retail value taken, 644

place where value determined, 645

at place of conversion, 646

where no market value at place of conversion, 646

where goods in transit, 647

time of fixing value, 648

time of conversion, general rule, 649

exceptions to rule, 650

for property of fluctuating value, 651, et seq.

rule of N. Y. courts, 652-654

highest intermediate value, 653

rule of avoidable consequences, 655

reasonable time after conversion to replace property, 656

states following N. Y. rule, 657

opposed to N. Y. rule, 657

views of Sedgwick, where value fluctuates, 658

property without market value, 659

cost of may be considered, 659

furniture, pictures, etc., 659

damages measured by actual value, 660

value enhanced by wrong-doer, 661

intent of wrong-doer, when material, 661

when enhanced value recovered, 662, 663

deducting cost of improvement, 664, 665

in case of mistake or bad faith of defendant, 666

DAMAGES — Continued

- general rule as to measure of — Continued
 - conversion of coal or ore, 667
 - mined through mistake, 667
 - value in place given, 667
 - for conversion of petroleum, 667
 - for conversion of timber, 668
 - good faith of wrong-doer, 668, 669
 - value of trees before severance given, 669
 - where wrong willful, 670
 - increased value given, 670
 - damages against purchaser from wrong-doer, 671
 - where wrong done wilfully, 671
 - damages enhanced value, 671
 - value of use of property as damages, 672
 - interest takes place of, 672
 - interest, why allowed on value, 673
 - from what time computed, 674
 - where owner re-purchases chattels, 675
 - amount paid as damages, 675
 - equivalent to return of chattels, 677
 - amount received by defendant, 678
 - in case of confusion of goods, 679
 - effect of good faith, 679
 - where gas or oil intermingled, 680
 - for conversion of mortgaged chattels, 681
 - in favor of mortgagee, 681
 - in favor of mortgagor, 682
 - for pledged property, 683, et seq.
 - in favor of pledgor, 683
 - in favor of pledgee, 684
 - for collateral security, 685
 - under conditional sales, 686
 - where price partly paid, 686
 - for shares of stock, 687
 - against corporation, 687
 - against individuals, 688
 - against carriers, 689
 - loss or non-delivery of goods, 689
 - wrongful delivery, 690
 - for deviation from route or instructions, 691
- special damages, general rule, 693
 - for property wrongfully seized, 694
 - loss of profits, 694, et seq.
 - expenses of following or recovering chattels, 696
 - attorney's fees, 696
 - punitive damages, 697
- mitigation of damages, 698, et seq.
 - general principles, 698

INDEX

(References are to sections)

DAMAGES — Continued

- general rule as to measure of — Continued
- property applied to owner's use, 699
- return of property, acceptance, 700
- property not accepted, 700

DEEDS:

- conversion of, 23
- measure of damages for, 692

DEFENDANT; DEFENDANTS:

- trover against, without title, 438
- weakness of title of, no ground of recovery, 438
- takes property when judgment procured against, 453
- change of venue by, 467
- joinder of, 476
- husband and wife as, 480
- mis-joinder of, 481
- general denial by, 527, et seq.
- special defenses by, 538
- similar acts by, evidence of, 611
- indictment or acquittal of, 612
- title in, evidence of, 618, 619

DELIVERY:

- failure or refusal of, by bailees, 91
- refused by warehouseman, without receipt, 92
- refused because demandant had no title, 93
- refusal of, by carrier, 98
- non-delivery by carrier, no conversion, 98
- by carrier before demand by bailor, 100
- qualified refusal of, by carrier, 103
- wrongful, by carrier, 105, 106
- production of bill of lading prior to, 105
- must be according to bill of lading, 106
- by carrier, without payment of draft, 107
- what is wrongful, 108
- fault of consignor excuse wrongful, by carrier, 109, 112
- by carrier, according to custom, 113
- refused by carrier without payment of extra sum, 115
- by carrier, under legal process, 118, 119, 120
- delay in, no conversion by carrier, 122
- wrongful, by partner, 196
- wrongful, motive immaterial, 303
- bailee acting as mere conduit in, 303
- to one found in possession of goods, 304, 305
- by vendor where payment to be made at time of, 402
- through fraud, 402
- wrongful, by carrier, damages for, 690

DEMAND; DEMAND AND REFUSAL:

- for possession of stolen property, 40

(References are to sections)

DEMAND; DEMAND AND REFUSAL — Continued

- by pledgee, before sale, 45
- evidence of conversion, 91
- may not be evidence of conversion, 92
- by one without title, 93
- on carrier, and refusal, 99
- on carrier, without payment of freight, 114
- on mortgagor, for possession, 123
- upon partnership, 197
- necessary where possession lawful, 323, 325
 - and no other act of conversion occurred, 323
- possession under void contract of sale, 323
- where agent sold without authority, 324
- on officer, for goods seized under process, 325
- on bailees and pledgees, 325
- on purchaser from mortgagor, 325 ,
- for goods on land recovered in ejectment, 325
- unnecessary, where property wrongfully taken, 326
 - where other act of conversion occurred, 327
 - or property claimed under void sale, 327
 - or possession obtained through duress, 328
 - by mistake or fraud, 329, 330
 - by trespass, 330
 - or property received under contract, 333
 - client's money loaned in agent's name, 333
 - money diverted to wrong use, 333
 - pledgee re-pledging property, 333
 - property taken under reversed judgment, 334
 - when possession rightful, 335
 - where defendant owns interest, 335
 - where useless, 336, 340
 - property already sold by defendant, 336
 - property out of control of defendant, 336
 - where property stolen, 337
 - where grains are mixed, 338
 - where goods confused, 338
 - waiver of, 339
 - on officers, 341
 - attaching goods of stranger, 341
 - where goods mixed with defendant's, 342
 - on wrongful purchaser, 343, 345, 346, 348
 - where defendant purchased from agent, 349, 351
 - on purchaser from conditional vendee, 349
 - not necessary where other conversion proved, 349
 - for goods bought in fraud of law, 350
 - by assignee of an insolvent, 350
 - where purchaser in good faith, 351
 - in sale of stolen goods, 351, 352, 353
 - must be made on bailee, when, 354

INDEX

(References are to sections)

DEMAND; DEMAND AND REFUSAL — Continued

unnecessary — Continued

- must be made on bailee, when — Continued
 - not where impossible to re-deliver, 354
 - where property sold by bailee, 355
 - against borrower of article, 356

- on partners, when necessary, 357

- for property rightfully in possession of, 357

- on co-tenants, as between themselves, 358, 359

- on agent, by principal, 360, et seq.

- what is required for a demand, 362, 375

- must be clear and absolute, 363

- whether letter sufficient as, 363, 371

- or telegram, 363

- by whom made, 365

- by attorney, 365

- by agent, 366

- upon whom made, 368

- agent, 368, 382

- joint bailees, 369

- corporations, 369

- how made, 370

- time and place for, 372, 273

- when evidence of conversion, 374

- for stolen goods, 375

- unqualified refusal is a conversion, 375

- refusal by attorney, 376

- when insufficient as a conversion, 377

- qualified refusal, 378

- reasonableness of, for jury to say, 380

- where impossible to comply with, 381

- by owner of lost property, 417

- whether necessary to plead, 512

- whether demand is waiver of conversion, 572

DEMUR; DEMURRER:

- to complaint, failing to allege value, 499

- or damages, 499

- general, 526

DESCRIPTION:

- of property, complaint must contain, 494

- substantial, sufficient, 494

- what is sufficient, 495-497

- in schedule attached to complaint, 498

DESTRUCTION OF PROPERTY:

- by co-tenant, 207, 219

- need not be physical destruction, 219

- by exclusive possession, 220

(References are to sections)

DESTRUCTION OF PROPERTY — Continued

- inability to deliver to co-tenant, 220
- as conversion, 293, 299
- what amounts to, 299
- unintentional, 299, 302
- without asserting ownership, 300
- through interference for protection, 301
- through public necessity, 301
- through negligence, 301

DETENTION :

- wrongful, by bailee, 91
- by lien-claimant, right of, 312
- wrongful, as conversion, 313

DETINUE :

- distinguished from trover, 13

DOGS :

- conversion of, 35

DRAFT :

- delivery by carrier without payment of, 107
- failure to pay, attached to bill of lading, 289

DUTY ; DUTIES :

- of pledgee, as to pledged property, 72
- of bailee, 79, 80 et seq.
- of owner, to give notice of rights, 610

EMINENT DOMAIN :

- applied to municipal corporations, 186, et seq.

ENHANCEMENT OF VALUE :

- by wrong-doer, measure of damages for, 662

EQUITABLE OWNER :

- when may maintain trover, 436

EQUITY :

- no remedy in, against pledgee, 77

ESTOPPEL :

- of owner, against purchaser from pledgee, 238
- must be specially pleaded, 543, et seq.

EVIDENCE :

- confusion of goods is rule of, 270
- demand and refusal are, of conversion, 332, 374
- possession *prima facie*, of title, 445
- of fraud, when not alleged, 508
- admissible under general denial, 531, 541
 - attacking plaintiff's title, 532
 - act of conversion, 534
 - value and damages, 536
- under allegation of special defense, 539

INDEX

(References are to sections)

EVIDENCE — Continued

- of justification, under general denial, 540, 541
 - special plea, 542, 554
- of waiver of conversion, 569, 570
 - ratification of act of, 570
- burden of proof as to title, 594
 - special interest, 596
 - possession, 598, et seq.
- presumptive, of conversion, 601, 602
 - of title, 602, 615
- manner of proof of conversion, 603
- proof of ownership, 603, 615
 - by circumstances, 603
- parol, 604, 616
 - documentary, 604
- best, 604, 616
- conduct of party as, 605
- self-serving declarations, 605, 606
- statements as, 605
- hearsay, 605, 606
- admissions, 606
- declarations of third party, 607
- of motive and good faith, 608
- of intent, 608, 619
 - where exemplary damages claimed, 608, 610
- of similar acts by defendant, 611
- of indictment or acquittal of defendant, 612
- of identity of chattels, 613, 614
 - of money, 613
- declarations of party, 616
- of title in defendant after suit brought, 620
- of title in third party, 621
 - under general denial, 621, 622
- of tortious act, 625
- of ratification of act, 626
- whether restoration may be shown, 627
- variance from pleadings, 629
- of value, 642, et seq.
- proof beyond reasonable doubt, 703

EXECUTION :

- wrongful levy of, 68
- property taken under reversed judgment, 334
- possession of officer under, 409
 - sufficient for trover, 409
 - must have made levy, 410
- damages for wrongful levy, 694

EXECUTORS AND ADMINISTRATORS:

- acting outside authority of appointment, 94

(References are to sections)

EXECUTORS AND ADMINISTRATORS — Continued

- cannot as such commit tort, 94
- property appropriated to use of estate, 94
- trover by, 427
- for conversion prior to death of decedent, 427
- for conversion after appointment, 427
- bringing property from another state, 458
- waiver of tort by, 568
- liable in trover for mingling funds, 17

EXEMPLARY DAMAGES: (See: Damages)

EXEMPT PROPERTY:

- refusal of officer to allow, 64
- third person causing levy or sale, 67

FACTORS AND BROKERS:

- conversion by, 57
- purchaser from, 243
- wrongful pledge by, 420

FEDERAL COURTS:

- jurisdiction of in trover, 462
- actions in bankruptcy, 464

FIRE:

- city removing structures to prevent, 185
- principle of eminent domain, 186, et seq.

FIXTURES:

- when trover not maintained for, 26
- annexed by tenant, 26
- agreement for removal, 27
- removal by co-tenant, 224, 225
- conversion of, by lessee, 424
- trade, what are, 424
- removal of, prevented by landlord, 426

FLUCTUATING VALUE:

- damages for property of, 651, et seq.
- rule of N. Y. courts, 652
- highest intermediate value, 653
- rule of avoidable consequences, 655
- reasonable time after conversion to replace property, 656
- states following N. Y. rule, 657

FRAUD:

- practiced upon carrier, 110
- sale by mortgagee, through, 129
- title of property sold through, 248
- sale by, 259, 260, 291
- no demand where possession obtained by, 330
- delivery procured by, 402

INDEX

(References are to sections)

FRAUD — Continued

- title through, 437
- as preventing running of statute of limitations, 485
- evidence of, without pleading, 508

FREIGHT :

- payment of, prior to conversion against carrier, 114
- carrier has lien for, 114
- tender of, to carrier, 115
- must be reasonable, 117

GAS; OIL :

- conversion of, 680

GEESE :

- conversion of, 35

GRAVEL :

- conversion of, 33, 34
- removal by mistake, 33

HEARSAY : (See : Evidence)

HORSES :

- conversion of, 9, 36
 - by driving to wrong place, 36
 - or longer distance, 36
 - mistake in going to wrong place, 36, 79
 - intention of bailee, when governs, 79
- mis-use of, by bailee, 80

IDENTIFICATION :

- of money, 16
 - not always necessary, 18
- evidence of, 613

INDICTMENT OR ACQUITTAL : (See : Conditions Precedent)

INFANT; INFANCY :

- no defense, in trover, 37, 83
- wrongful use of horse by, 37
- bailees, liable, 83
- conversion by, 255, 256

INNOCENT PURCHASER :

- of stolen property, 39, 254, et seq.
- from unauthorized vendee, 235
- from pledgee or bailee, 238
- from vendee in conditional sale, 246
- enhancing value of property, 671

INSTRUCTIONS :

- court's duty to give, 665

(References are to sections)

INSTRUCTIONS — Continued

- what are improper, 665
- defect must be as to substantive right, 665
- party's duty to request, 665
- must be on material matter, 666
- what should contain, 666, 667

INSURANCE POLICY :

- conversion of, 38
- measure of damages for, 692
- where void, 692

INTENT :

- to do kindness to owner, no conversion, 3
- is generally immaterial in conversion, 4, 346
- sometimes held material, 5, 6, 7, 257
- has bearing on measure of damages, 8
- by bailee, 79, 81
- in confusion of goods, 279
- under accession, 286
- in destruction of property, 302
- in buying property, 350 (N. Y. rule), 351
- evidence of, 608, 610
- where exemplary damages claimed, 608, 610
- where owner's duty to give notice of rights, 609
- shown by similar acts of defendant, 611

INTEREST :

- allowed as part of damages, 630, 648
- why allowed on value of property, 673
- from what time computed, 674

JOINDER :

- of plaintiffs, 472
- of partners, as plaintiffs, 472
- of mortgagor and mortgagee, as plaintiffs, 475
- of lessor and lessee, 475
- of defendants, 476
- mis-joinder of defendants, 481
- of causes of action, 519
- trover, with action on contract, 519
 - of trespass, 521

JOINT OWNERS :

- trover by, 384, et seq.

JUDGMENT; JUDGMENTS :

- not subject of conversion, 24
- property taken under reversed, no demand for, 334
- levy under void, 341
- for no more damage than alleged, 500
- partial satisfaction of, 592

INDEX

(References are to sections)

JUDGMENT ; JUDGMENTS — Continued

- against part of wrong-doers, 592
- in trover, 670
 - form of, 670
 - alternative, 670
- must be in accordance with findings, 670
- effect of, 671
- title transferred by, 671
- satisfaction of, 671
- appeal from, 672

JURISDICTION :

- of state courts, in trover, 456, et seq.
- where goods converted in another state, 457, 459
- of justices courts, 460, et seq.
 - to a limited amount, 460
- of federal courts, 462, et seq.
 - bankruptcy matters, 464
- dependent on amount involved, 465
- must appear from complaint, 466
- of parties, fixes venue, 467
- not conferred by waiver of tort, 567

JURY :

- question for, as to whether demand sufficient, 362
 - whether refusal reasonable, 380
- court's duty to instruct, 665
- province of, not to be invaded by court, 665
- not to find beyond reasonable doubt, 666
- instructions to, to contain what, 666, 667
- province of, 668
- must determine questions of fact, 668
- verdict and findings of, 669
 - sufficiency of, 669

JUSTICE OF THE PEACE :

- jurisdiction of, in trover, 460
 - depends on state law, 461
 - limited by amount involved, 466

JUSTIFICATION :

- evidence of, under general denial, 540, 552
- whether must be specially pleaded, 542, 552

LANDLORD :

- conversion by, of tenant's share, 28, 29
- action against tenant for removal of straw, 30
- forbidding removal of buildings by tenant, 294
 - procuring injunction against, 294
- trover by, 422, 435

(References are to sections)

LANDLORD — Continued

- lien of, on crop, 422, 423
- preventing removal of fixtures, 426

LAWYERS; ATTORNEYS:

- liable in trover for moneys collected, 18
- demand by, 365
- refusal of possession by, 376
- fees of, as damages, 696

LESSORS AND LESSEES:

- as plaintiffs, 475 (See: Tenant; Landlord)

LETTER:

- conversion of, by wrongful sending, 4
- whether sufficient as demand, 363, 365, 370

LEVY:

- wrongful, by officer, 65, 68, 341
- wrongful, of attachment, 261
- on goods of stranger to writ, 264
- one directing wrongful, 265
- must be, under execution, 410

LIEN:

- of carrier for freight, 114
- of corporation, on shares, 138, 139
- claiming, when none exists, 311
- agister attempting to enforce, 311
- waiver of, 311
- failing to claim, 311
- surrendering possession, 311
- right to possession, 311
- holder of, right to sue in trover, 401
 - must have right to possession, 401
- for repairs, 401
- of vendor, protection of, 402
- delivery through fraud, 402
- of landlord, 422

LIMITATION; STATUTE OF LIMITATIONS:

- when right of action accrues, 482
 - against bailees, 482
 - against agent, 483
 - knowledge of conversion, 484
- fraud prevents running of, 485
- pleading, 553

LOSS:

- of property, through fault of co-tenant, 226
 - surrendering note to maker, 226
 - changing personalty to realty, 227
- measure of damages against carrier, 689

INDEX

(References are to sections)

LOST PROPERTY :

- trover originally remedy to recover for, 11
- trover by finder of, 412, 413
- what is, 412
- finder entitled to possession, 412
- lost bank bills, 413, 414
 - jewels, 414
 - bills and notes, 415
 - aerolite, 416
- trover by owner of, 417
- finder of, refusing to surrender, 417

MAIL :

- conversion of, 9, 38

MALICE :

- must be pleaded, 509

MISTAKE :

- may be conversion through, 4
- may be defense, 6
- in cutting timber, 31
- by hirer of horse in going wrong way, 36
- by carrier in delivery, 105
- no excuse for mis-delivery by carrier, 109
- by corporation, in transferring stock, 135
- by innocent purchaser, 236
- no demand where possession by, 329

MITIGATION OF DAMAGES: (See : Damages)

MONEY :

- when may be converted, 16
- when can be identified, 17
- special deposit, bank liable for, 17
- mingling, by administrator, 17
- taking by assault, 17
 - robbery, 17
- defendant having commissions in, 18
- collected by attorney, trover for, 18
- stolen, 41
- client's, loaned by agent in own name, 333, 388
- diverted to wrong use, 333
- demand for on agent, by principal, 361
- description of in complaint, 495, 496
- embezzled, 601
- evidence of identity, 614
- measure of damages for, 630

MORTGAGED PROPERTY :

- conversion of, by mortgagee, 123, 125

(References are to sections)

MORTGAGED PROPERTY — Continued

- wrongful use of by mortgagor, 124, 128
- surrender of by mortgagor to junior mortgagee, 124
- wrongful sale of, 124, 125, 126
 - by mortgagor, 124
 - by officer, 126, 267
- wrongful seizure of, by officer, 127
- wrongful attachment of, 128
- purchaser of, liable to mortgagee, 128
- conversion of, by mortgagee, 129
- irregular sale of, by mortgagee, 130
- trover for, 397, et seq.
- wrongfully attached, 397
- measure of damages for, 681

MORTGAGEE :

- trover by, against mortgagor for wrongful use, 124
 - against officer for seizing, 126, 127, 267
- purchaser liable to, 128
- junior, liable to senior, when, 128
- assignee of, trover in favor of, 128
- trover against by mortgagor, 129, 268
- sale by, without foreclosure, 129, 268
- purchasing mortgaged property, 129
- irregular sale by, 130, 268
- trover by, 397, et seq.
 - against mortgagor, 398
 - measure of damages, 681

MORTGAGOR :

- removing house from mortgaged land, 25
- conversion by, 123, 124
- refusal of, to surrender possession to mortgagee, 123
- unwarranted use of chattels by, 124, 128
- surrendering property to junior mortgagee, 124
- wrongful sale by, 124
- secreting property, 124
- purchaser from, 125, 128
- officer and creditor liable to, in trover, 126
- trover by, against mortgagee, 129
- purchaser from, demand for possession, 325
- trover by, 397, et seq.
 - for wrongful attachment, 397
- liable to mortgagee in trover, when, 398
- measure of damages, 681, et seq.

MOTIVE :

- immaterial in conversion, when, 4
- in wrongful delivery, 303
- in purchasing goods, 351, 352, 353

INDEX

(References are to sections)

MOTIVE — Continued

evidence of, 608

where owner's duty to give notice of rights, 609

MUNIMENTS OF TITLE :

conversion of, 23

MUNICIPAL CORPORATIONS :

liability of, in trover, 156

for torts in general, 156, et seq.

what are, 157

liability of, for acts of agents, 158

ultra vires acts of, 158, et seq.

acts of, within scope of power, 164

acts of agents of, in good faith, 165

applying rule of respondeat superior, 169

when agent of state, 171

conversion by, 177, et seq.

abatement of nuisances by, 180

removing structures to prevent fire, 185

principle of eminent domain, 186

NEGLIGENCE :

no conversion through, 301, 317

of carriers, no conversion, 317, 318

nor of bailee, 317

nor receiptor, 319

does not affect previous conversion, 320

may contribute to conversion, 320

gross, 320

demand on bailee when, 354

NON-DELIVERY :

by carrier, damages for, 689

NOTICE :

sale of pledged property without, 45

purchaser of pledged property without, 51

must be given, of sale under mortgage, 130

of by-law of corporation, to transferee of stock, 139

officer selling property without, 263

duty to owner to give, 609

NUISANCES :

abatement of, by municipal corporation, 180, et seq.

what are, and what are not, 183, et seq.

OFFENSE :

conversion is, against possession, 2

OFFICERS :

conversion by, 64

OFFICERS — Continued

- conversion by — Continued
 - by sale of exempt property, 64
 - by wrongful levy, 65
- third person directing levy by, 67, 263
- liable to mortgagee for wrongful seizure, 127
 - wrongful attachment, 128
- corporations liable for acts of its, 131
- of municipal corporations, 158, et seq., 177
 - acts of, in good faith, 165, 166
 - rule of respondeat superior, 169, et seq.
- demand on, necessary when, 225, 341
- protected by process fair on its face, 261
- must do only what process permits, 262
- irregularities in sale by, 263
- selling goods of stranger to writ, 264
- liable to pledgee, when, 393
- trover by, 404, et seq.
- has special property in goods attached, 404
- where goods bailed by, 405
- trover by deputy, 407
- acting under execution, 409

OIL :

- conversion of, 680
- measure of damages for, 680

ORE :

- conversion of, 33
- removal by mistake, 33
- trover for, by tenant, 426
- measure of damages for conversion of, 667

OWNERSHIP :

- assumption of, as conversion, 292, 293]
 - what is, 293—4
- landlord forbidding removal of buildings, 294
- instances of wrongful assumption of, 295, 297, 298
- mere interference is not assumption of, 298
- destruction without asserting, 300
- necessary to support trover, 383
- absolute, to support trover, 430
- equitable, 436
- through fraud, 437
- without possession, 439
- complaint must allege, 490, et seq.
- draws to it possession, 559
- proof of, 603, 604
- what amounts to, 603
- conduct as to, 605
- evidence of, 615, et seq.

INDEX

(References are to sections)

PARTIES :

- plaintiff, must own interest, 468
- assignee, as plaintiff, 469, et seq.
- joinder of plaintiffs, 472
- joinder of defendants, 476, et seq.
- mis-joinder of, 481
- (See : Plaintiff ; Defendant)

PARTNERS :

- each, is agent of other, 192
- firm is liable for torts of, 192, 193
 - for conversion, 194
- ratification of act of partner, 194
- repudiation of act of partner, 194
- wrongful delivery of goods by, 196
- demand upon, 197
- wrongful sale of property by, 199
 - proceeds for benefit of firm, 199
- liabilities of as bailees, 200, et seq.
- tort of, must be within scope of business, 202
- one, having special authority from owner, 203
- benefit to firm from act of, 204, 205
- demand on, for possession, 357, 369, 382
- trover by, when, 383
- joinder of, as plaintiffs, 472, et seq.
 - as defendants, 478
- whether necessary to allege partnership, 504

PLAINTIFF :

- must be owner of interest, 468
- assignee as, 469, et seq.
- real party in interest, 471
- joinder of, 472, et seq.
- partners as, 473
- mortgagor and mortgagee as, 475
- lessor and lessee as, 475
- title of, attacked under general denial, 532
- must prove value and damages, 536
 - title, 594
- owner of special interest, 634, et seq.

PLEADING :

- in trover, declaration or complaint, 452, et seq.
- joinder of plaintiffs, 472
 - of defendants, 476
- complaint, requirements of, 487, et seq.
 - as to title and possession, 490
 - description of property, 494
 - what sufficient, 495
- must allege value and damage, 499

PLEADING — Continued

complaint — Continued

- demurrer to, for failure, 499
- proper allegations of, 500
- special damages, 501, 649
- exemplary damages, 501
- act of conversion, 502
- by whom act committed, 503
- whether partnership to be alleged, 504
- against two or more, 504
- manner of conversion, 505, 510
- sufficiency of allegations, 506
- may recite details, 507
- fraud of defendant, 508
- malice, 509
- conditions precedent, 511
- demand and refusal, 512, et seq.
- time of conversion, 518
- joinder of causes of action, 519, et seq.
- splitting causes of action, 522, 592
- general denial, 527, et seq.
- statute of limitations, 528
- new matter, in answer, 528, et seq.
- counter-claim, 531
- special defenses, 538
- justification, 540, 542
- waiver, estoppel or ratification, 543, et seq., 552
- res adjudicata, 546
- set-off or counter-claim, 547
- mitigating matters to be pleaded, 550, 551
- statute of limitations, 553
- admissions in answer, 554
- amendment of answer, 555
- reply, 556, et seq.
- theory of, indicates remedy, 590
- variance of proof from, 629

PLEDGED PROPERTY :

- conversion of, 43, 44
 - by mis-user, 44
 - by refusal to return, 44
 - by wrongful sale, 44, 46, 48, 73
- waiver of conversion of, 49
- tender of payment, prior to trover for, 50
- conversion of, by third person, 51
- surrender of possession of, 69, 70
- wrongful use of, by pledgee, 71
- cannot be re-pledged, 73
- where pledge wrongful, trover by owner, 419

INDEX

(References are to sections)

PLEDGED PROPERTY — Continued

where pledge wrongful, trover by owner — Continued
by agent, 420
measure of damages for, 683, et seq.

PLEDGEE :

refusal by, to return pledged note, 19
conversion by, of shares of stock, 21
wrongful sale by, 43, 48, 73
giving away pledged property, 51
instances of conversion by, 69
surrender of possession by, 69, 70
unauthorized use by, 71
governed by contract of pledge, 72
duties of, as to pledged property, 72
cannot re-pledge property, 73
cannot purchase the property, 75
no remedy in equity against, 77
rights of, under statutes, 78
unauthorized sales by, 238, 292, 390
purchasers at, 238
demand on, for possession, when, 325
re-pledging property, 333, 380
trover by, 390, et seq.
trover against, by pledgor, 390
refusing to return property, 390
suing pledgor for conversion, 392
is entitled to possession, 393
officer liable to, when, 393
where pledge wrongful, trover by owner, 419
measure of damages against, 683
against, 684

PLEDGOR :

trover by, 390, et seq.
against pledgee, 390
third person, 390, 391
trover against, by pledgee, 392
measure of damages in favor of, 683
against, 684

POSSESSION :

lien-holder must have right of, 401
obtaining by vendee through fraud, 402
by officer under attachment, 405, 406
executions, 409, 411
by finder of lost property, 412
of administrator or executor, 427
coupled with ownership, 430, et seq.
with special interest, 434

INDEX

(References are to sections)

POSSESSION — Continued

- title without, 439
- without title, 445, et seq.
- is prima facie evidence of title, 445
- constructive, sufficiency of, 449
- complaint must allege, 490
 - at time of conversion, 492
- burden of proof as to, 498
- evidence to prove, 615, et seq.

PRESUMPTION; PRESUMPTIONS:

- possession is, of title, 602
- taking is, of conversion, 601
- of conversion by withholding possession, 602

PRINCIPALS:

- conversion by, 52, 53
- conversion of property of, by agent, 61, 62
- demand by, on agent, 360
 - where agent received money for, 361
 - where agent denies agency, 361
- trover by, 387

PROCESS:

- surrender of goods by carrier under legal, 118
- must be fair on its face, 119, 120, 261
- collusion of carrier in procuring, 120
- taking property under legal, 261
- levy on goods of stranger, 264
- one directing wrongful seizure under, 265

PROFITS:

- loss of as damages, 694, et seq.

PUBLIC SALE:

- pledged property must be sold at, 46, 74

PUNITIVE DAMAGES:

- when allowed, 697

PURCHASERS:

- from unauthorized vendors, 234, 236
- in good faith, 235, 350
- act at their peril, 236
- mistake of, 236
- from pledgees and bailees, 238
 - estoppel of owner as against, 238
- rule of caveat emptor applied to, 240
- from co-tenant, 241
 - no conversion by retaining possession, 241
- from agent, 242, 245
- from vendees in conditional sales, 346

INDEX

(References are to sections)

PURCHASERS — Continued

- from fraudulent sales, 248, 251
- of stolen property, 252
 - negotiable instruments, 253
- from one without title, no demand on, 343, 350
- from unauthorized agent, no demand on, 349
- intent of immaterial, 350
- acting in good faith (N. Y. rule), 351
- of stolen goods, demand for, 351
- trover by, 403
- must pay price, 403
- measure damages against, 671
- from a wilful wrong-doer, 671
 - damages for enhanced value, 671

RATIFICATION :

- by principal, of agent's acts, 53
- of wrongful act of officer, 68
- by partner, of act of other partner, 194
- must be specially pleaded, 543, et seq.
- of conversion, 570
- proof of, as defense, 626

RECOUPMENT :

- against owner of special interest, 638
- when allowed, 639, 640
- deducting amount due defendant, 641

REMEDY ; REMEDIES :

- trover and replevin, concurrent, when, 14, 116
- none in equity, against pledgee, 77
- choice of, 453
- action between tort and contract, 589, et seq.

REPLEVIN :

- distinguished from trover, 14
- and trover, concurrent remedies, when, 14, 116
- unsuccessful defendant in, refusing to return property, 288
- of attached property, 408
- difference between, and trover, 453
- bringing, as waiver of tort, 593

REPLY :

- denying new matter in answer, 556
- necessity of, 556
- must be responsive, 557
- must be consistent with complaint, 558

RE-PURCHASE BY OWNER :

- measure of damages in case of, 675, et seq.
- equivalent to return of property, 677

RES ADJUDICATA :

must be specially pleaded, 546

RESPONDEAT SUPERIOR :

rule of, in trover, 52, 53

applying to municipal corporations, 169

in partnerships, 192

RESTORATION OF PROPERTY :

after suit brought, 627

whether may be shown, 627

effect of, if accepted, 628

as mitigation of damages, 700

ROBBERY :

taking money by, as conversion, 17

ROCK :

conversion of, 33

removal, by mistake, 33

SALE :

by thief, 39, 40

of stolen goods, by auctioneer, 40

of stolen money or bonds, 41

wrongful, by pledgee, 44

of pledged property, must be public, 46, 74

by officer, of exempt property, 64

wrongful, by bailee, 84, 85, 309

wrongful, by mortgagor, 124, 128, 267

by officer, of mortgaged property, 125

by mortgagee, without foreclosure, 129, 130

purchase at, by mortgagee, 129

notice of, under mortgage, 130

irregular, by corporation, for unpaid assessments, 150

wrongful, of goods, by partners, 199

by one co-tenant, 208

amounts to destruction, 210

of entire property, 213

denial of this rule, 215, et seq.

by vendee in conditional sale, 246

through fraud, 259

irregular, by officer, 263

wrongful, as conversion, 289, 290

no demand when property claimed under void, 327

illegal, by tax collector, 328

no demand necessary after, 336, 343-350

after trover started, 383

amount received from, as measure of damages, 678

SERVANT :

misappropriating master's money, 17

INDEX

(References are to sections)

SERVANT — Continued

- misappropriating master's goods, 328
- cannot maintain trover, 447

SHARES OF STOCK:

- trover for conversion of, 21
- conversion of, by pledgee, 21, 22
- wrongful sale of, as conversion, 22
- refusal of corporation to issue, 22, 143
- wrongful transfer, 22
- conversion of pledged, 44, 48
- wrongful transfer of, by corporation, 132, 133, 143
- agent of corporation, transferring, to self, 134
- mistake in transfer of, corporation liable, 135
- refusal of corporation to enter name of assignee, 136, 137, 140, 142
- lien of corporation on, for share-holder's debt, 138, 139, 141
- certificate reciting "fully paid," 142
- conversion of "shares" or "certificates," 144-147
- irregular sale of, for unpaid assessments, 150, et seq.
- return of, after suit brought, 152
- sale of, held in trust, 154
- measure of damages for, 687, et seq.

SPECIAL DEPOSIT:

- bank liable for, 17
- conversion of, by bank, 155
- what is, 155
- bank treating as general fund, 309

SPECIAL INTEREST:

- when will support trover, 383
- pledgee has, 390
- bailee has, 394
- of lienor, 401
- coupled with possession, 430, et seq., 434
- plaintiff must prove, 596
- what is, 596, 597
- measure of damages for conversion of, 634, et seq.

STATUTE; STATUTES:

- fixing rights and duties of pledgee, 78
- regulating sale of mortgaged property, 130
- destruction of property under to prevent fire, 189, 190
- of limitations, 482

STOLEN PROPERTY:

- trover for, 39
- sale of, 40
- no demand for, necessary, 40
- sale of, by auctioneer, 40

(References are to sections)

STOLEN PROPERTY — Continued

- negotiable instruments, 41
- trover for, prior to conviction of thief, 42
- purchaser of, 252
 - no title in, 252, 255
 - negotiable instruments, 253
 - caveat emptor applied to, 253
- demand for and refusal, whether conversion, 337
- re-sale of, 337
- purchaser of, demand on, 351
- refusal to surrender, 375
- trover by owner of, 418
 - commercial paper, 418

TAKING :

- manual, not necessary in trover, 2
- wrongful, as element in conversion, 257
- intent in, 257
- by fraud, 259, 260
- under legal process, 261, 262
- under chattel mortgage, 267
- re-taking by vendor after delivery, 287
- need not be willful, 288
- instances of wrongful, 288
- through duress, 328
- wrongful, pleading, 510
- presumption of conversion from, 601, 602

TENANT :

- fixtures placed by, 26
- trover by, against landlord, 28, 29, 128
- action against, by landlord for removal of straw, 30
- landlord taking wrongful possession of crops, 128
- removal of buildings prohibited by landlord, 294
- trover by, 422, 425
- withholding crop from landlord, 423
- conversion of fixtures, 424
- may bring trover against landlord, 425, 426

TENDER :

- of debt, prior to trover for pledged property, 50, 76
- of freight charges before trover against carrier, 114
- where other conditions demanded by carrier, 115

TIMBER :

- conversion of, 31, 32
- measure of damages for conversion of, 32, 668, 670
- sale of, by co-tenant, 224
- change in form of, by co-tenant, 230

TIME :

- of conversion, pleading, 518

INDEX

(References are to sections)

TIME — Continued

- where unknown to plaintiff, 518
- in general, 648
- damages as, of conversion, 648, 649
 - exceptions to general rule, 650
 - for property of fluctuating value, 651, et seq.
 - rule of N. Y. courts, 652
 - highest intermediate value, 653
 - rule of avoidable consequences, 655
 - reasonable, after conversion to replace property, 656
 - states following N. Y. rule, 657

TITLE :

- must be interfered with, in conversion, 7
- prima facie, in thief, by possession, 39
- what, necessary to sustain trover, 123
- only divested by consent of owner, 237, 245
- of property sold through fraud, 248
- under accession, 286
- what necessary to support trover, 430
- equitable, 436
- through fraud, 437
- where defendant without, 438
- weakness of defendant's, no ground of recovery, 438
- without possession, 439, et seq.
- possession without, 445, et seq.
- possession prima facie evidence of, 445
- complaint must allege, 490, et seq.
 - at time of conversion, 492
- burden of proof as to, 594
 - special interest, 596
 - what is, 596, et seq.
- possession follows, 600
- evidence of, 615, et seq.
 - of defendant, 618
- acquired by defendant after suit, 620
- of third party, whether defendant may show, 621
- transferred by judgment in trover, 671

TRANSITORY :

- trover is, 15, 456, 467

TRESPASS :

- trover distinguished from, 12, 453
- no demand necessary for conversion by, 330

TRESPASSER :

- trover by, 428
- whether entitled to possession, 428

TRIAL :

- questions for the court, 663

TRIAL — Continued

- court controls, 663
- party may re-open case, 663
- court may order non-suit, 663
 - or restoration of property, 664
- court must instruct jury, 665
- instructions, 665
- finding beyond reasonable doubt, 666
- province of jury, 668
- verdict and findings of jury, 669
- judgment, 670
 - form of, 670
 - effect of, 671

TROVER :

- is remedy for conversion, 11
- was originally to recover for lost property, 11
- is action to recover damages, 11
- is legal action though equitable in nature, 11
- distinguished from trespass, 12
 - detinue, 13
 - replevin, 14
- and replevin concurrent remedies, when, 14, 116
- plaintiff in, must prove conversion, 15
- is transitory action, 15, 456
- venue in, 115
- for money, 16
- against attorney for money collected, 18
- will not lie for plain indebtedness, 18
- for bills and notes, 19, 20
- for shares of stock, 21, 22
- for muniments of title, 22, 23
- for deeds, 23
- does not lie for judgments or records, 24
- for buildings, 25
- for fixtures, 26
 - annexed by tenant, 26
 - agreement for removal, 27
- for crops, 28, 29
- for timber, 31, 32
- for rock, gravel and ore, 33, 34
- for sand, 34
- for aerolites, 34
- for animals, 35, 36
- for geese, 36
- against infant, 37, 83
- for mail, 38
- for insurance policy, 38
- for bank book, 38

INDEX

(References are to sections)

TROVER — Continued

- for account books, 38
- for stolen property, 39, 40
 - before conviction of thief, 42
- for collateral and pledged property, 43, 44, 48, 74, 76
- against third persons for pledged property, 51
- against principals, 52
- rule of respondeat superior, 52
- against agents, 54, 55, 56
- against brokers and factors, 57
- against auctioneers, 59, 125
- against officers, 64, 68
- against person directing wrongful attachment, 67
- against bailees, 79, et seq.
- for demand and refusal of possession, 91, 92
- whether lies against administrator, 94
- against carrier for deviation, 97
 - refusal to deliver goods, 98, 99
- not predicated on negligence, 98
- for wrongful delivery by carrier, 105, 107, 108
- against carrier by indorsee of bill of lading, 106
- against mortgagor, 124, 125
- against purchaser from mortgagor, 125
- against officer selling mortgaged property, 126
 - seizing mortgaged property, 127
- against landlord, 128
- by assignee of mortgage, 128
- against mortgagee by mortgagor, 129, 268
- against corporations, 131, et seq.
- for conversion of shares or certificates, 144-5-6-7
- for conversion of trust property, 153, 154
- for special deposits, 155
- against municipal corporations, 156, et seq.
- for ultra vires acts of municipal corporations, 159
 - within scope of authority, 164
 - abatement of nuisances, 180
 - removing buildings to prevent fire, 185
- against partnership, 194, et seq.
- for wrongful sale, 199
- for act of partner outside scope of business, 202
- by one co-tenant against another, 206
 - for sale of property, 208, 210, 218
 - for removal of property, 242, 225
 - for mis-using property, 229
 - changing form of property, 230
 - excluding co-owner from possession, 232
- against vendee, 232
- against purchaser from unauthorized vendors, 234
 - from co-tenant, 241

TROVER — Continued**against purchaser from unauthorized vendors — Continued**

from agent, 242, 245

from conditional vendees, 246

from fraudulent vendees, 248

of stolen property, 252, et seq.

of negotiable instruments, 253

against infants, 255, 256

against officer, 262, et seq.

for wrongful confusion of goods, 274, et seq.

under principle of accession, 282, et seq., 285

against vendor for re-taking property, 287

for wrongful sale, 289, 290

for assumption of ownership, 292, et seq.

for destruction of property, 291, 299

by wrongful use, 308

for claiming lien when none exists, 311

for wrongful detention, 313

for words without acts, 314

does not lie for negligence, 317

not supported by breach of contract, 322

demand, condition precedent to, when, 323

against purchaser from agent, demand necessary, 324

no demand where possession acquired wrongfully, 326

against tax collector, 238

for conversion through mistake or fraud, 329

against officer, without demand, 341

who may bring, 383, et seq.

by partner, 383

by widow, 383

joint owners, 384, 385

by principal and agent, 387, et seq.

by pledgors and pledgees, 390, et seq.

by bailors and bailees, 394, et seq.

by mortgagors and mortgagees, 397, et seq.

by holder of commercial paper, 399

by holder of collateral, 399

by lien-holder, 401, et seq.

by vendor, 402

by purchaser, 403

by officers, 404

by deputy officer, 407

by finder of lost property, 412

by owner of lost property, 417

of stolen property, 418

of chattels wrongfully pledged, 419

by lessors or lessees, 422

by executors or administrators, 427

by trespasser, 428

INDEX

(References are to sections)

TROVER — Continued

- by assignee of bankrupt, 429
- by agister, 429
- right of action in, assignable, 429
- ownership necessary to support, 430, et seq.
 - special interest, 434
 - equitable title, 436
- by one in constructive possession, 449
- history of, 450
- declaration or complaint in, 452, 454
- is for damages, not for property, 453, 456
- jurisdiction of courts in, 456, et seq.
- for goods converted in foreign state, 457
- in justice courts, 460, et seq.
- in federal courts, 462
- complaint in, requirements of, 490, et seq.
 - as to title and possession, 490
 - description of property, 494, 495
 - value and damages, 499
- condition precedent to, 511, 612
- must be for whole cause of action, 522
- res adjudicata in, 546
- set-off or counter-claim in, 547
- waiver of right to, 559, et seq., 569
 - effect of, 589
 - by bringing replevin, 593
- where property restored, 627-8
- measure of damages in, 630, et seq.
- judgment in, 670
 - title transferred by, 671

TRUST PROPERTY :

- conversion of by corporation, 153
- sale of stock held as, 154

ULTRA VIRES ACTS :

- of corporation, 131
- of municipal corporation, 158, et seq.
 - what are, 159
 - good defense to tort, 159, et seq.
- acts are not if within scope of power, 164
- respondeat superior applied to, 169

USE OF PROPERTY :

- value of, as damages, 672
 - interest takes place of, 672
- leased property, 672

VALUE :

- complaint must allege, 499
- whether material, 499

INDEX

(References are to sections)

VALUE — Continued

- if not denied need not be proved, 499
- as to time of conversion, 500
- evidence against, under general denial, 536
- proof of, 642, et seq.
- market value is measure of damage, 624, et seq.
 - how determined, 643
 - wholesale or retail, 644
- place where value determined, 645
- goods in transit, 647
- time of fixing, 648, 649
- fluctuating value, 651, et seq.
 - rule of N. Y. courts, 652, 654
 - highest intermediate value, 654
 - rule of avoidable consequences, 655
- property without market value, 659
- damages measured by actual value, 660
- enhanced by wrong-doer, 661, 662
- deducting cost of improvement, 664
- in case of mistake or bad faith of defendant, 666
- of use of property as damages, 672
- interest on, 673

VARIANCE :

- of proof from pleading, 629
- what is fatal, 629

VENDEE ; VENDOR :

- of co-tenant, 232
- purchaser from unauthorized, 234
- of pledgees and bailees, 238
- co-tenant as, 241
- agent as, 242
- conditional vendees as, 246
- fraudulent, 248, 251
- of stolen property, 252, et seq.
 - negotiable instruments, 253
- wrongfully re-taking property, 287
- lien of, protection of, 402
- delivery by, when payment to be made, 402

VENUE :

- in trover, 15, 467
- where jurisdiction of parties obtained, 467
- specified by statute, 467
- failure to state in complaint, 467
- change of, by defendant, 467

WAIVER :

- of conversion, by pledgor, 49
- of lien by surrender of possession, 311

INDEX

(References are to sections)

WAIVER — Continued

- of demand, 339
 - by admission in answer, 339
- must be pleaded, 543
- what is, 559, et seq.
- of tort, in general, 559, et seq.
- where promise implied, 563, 567, 582, 586
- by assumpsit, 563, 564
- in conversion, 563, 569
- theory of, 567
- cannot confer jurisdiction on court, 567
- who may waive, 568
- by legal representatives, 568
- by one tenant in common, 568
- how shown, 569, 570
- by ratification, 570
- by acquiescence, 571
- whether by demand for property, 572
- by bringing assumpsit, 574
 - whether property sold, 574
 - holding that sale necessary, 575, et seq.
 - contra, 580, et seq.
- effect of, 589, et seq.
- by election of remedies, 589, 590
- whether irrevocable, 591, 593
- judgment after, 592
- bringing replevin, 592

WORDS:

- conversion by, 314
- must show intention of exercising dominion, 314
- prohibiting removal of property, 314
- aiding another to convert property, 314
- speaker must have control of property, 315
- threatening owner with violence, 315
- no conversion if owner may take possession, 316
- to a stranger, no conversion, 316

WRONGFUL ACT:

- must be, in conversion, 10
- must be positive, tortious, 307
- proof of, necessary, 625

WRONGFUL DELIVERY:

- by carrier, damages for, 691

WRONGFUL USE:

- of horse, as conversion, 9
- of pledged property by pledgee, 71
- of property by bailee, 80, 81, 82
- by mortgagor, 124
- of property by co-tenant, 229

INDEX

(References are to sections)

WRONGFUL USE — Continued

is, in general, conversion, 308

by bailee, 308, 309

holder of collateral, wrongfully surrendering, 309

by agent, 309

by bank, of special deposit, 309

use under contract, 310

assent to, by bailor, 310

